

1-1-2014

# Teaching LLCs by Design

Anne M. Tucker

*Georgia State University College of Law, amtucker@gsu.edu*

Follow this and additional works at: [https://readingroom.law.gsu.edu/faculty\\_pub](https://readingroom.law.gsu.edu/faculty_pub)

 Part of the [Business Organizations Law Commons](#), and the [Legal Education Commons](#)

---

## Recommended Citation

Anne M. Tucker, Teaching LLCs by Design, 71 Wash. & Lee L. Rev. 525 (2014).

This Article is brought to you for free and open access by the Faculty Publications at Reading Room. It has been accepted for inclusion in Faculty Publications By Year by an authorized administrator of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

# Teaching LLCs by Design

Anne M. Tucker\*

## *Table of Contents*

I. Introduction .....	526
II. Good Bedfellows: LLCs and Experiential Exercises .....	528
A. Teaching Doctrine Through LLC Experiential Exercises .....	531
B. Teaching Skills Through LLC Experiential Exercises .....	534
III. Example of a Negotiated and Drafted Agreement Experiential Exercise: Letter of Intent to Form an LLC and Complete an Asset Purchase Agreement.....	536
A. The Problem Set Up .....	537
1. Opposing Counsel & Co-Counsel Groups .....	537
2. Materials .....	538
a. Client Packet .....	538
b. Annotated Form Letter of Intent .....	539
c. Research File .....	540
B. Assignments .....	541
1. Question Sets .....	541
2. Issue Identification Grid .....	541
3. Partial, Initial Drafts .....	543
C. Classroom Support .....	544

---

\* Assistant Professor of Law, Georgia State University College of Law. I would like to thank my colleague Andrea Curcio for her support in writing this paper, our Dean Steve Kaminshine for supporting me in creating the course and the materials described herein, the many students who have participated in the exercises described herein and provided invaluable feedback, and the attendees at the AALS Section on Agency and Partnership at the 2014 Annual meeting for their feedback. Special recognition is owed to N. Browning Jeffries, Associate Professor at Atlanta's John Marshall Law School who graciously shared a drafting exercises and teaching insights that served as the genesis of the LLC LOI exercise discussed in this Article.

D. Assessment and Feedback.....	546
IV. Facilitating Transactional Skill Acquisition Through Experiential Exercises.....	549
A. Professionalism.....	550
B. Negotiation .....	553
C. Drafting .....	555
D. Counseling .....	557
E. Issue Analysis, Business Perspectives and Financial Literacy .....	559
V. Modifications and Suggestions for Incorporation .....	560
A. Survey Course .....	561
1. Stand Alone Assignments.....	561
2. Limited-Scope Drafting Exercises.....	561
B. Upper-level course.....	562
1. Deepening the Financial Issues. ....	562
2. Incorporating a Due Diligence Simulation .....	563
3. Expanding the Written Work Product .....	563
4. Emphasizing Lawyering Skills.....	564
C. Hybrid Entities.....	564
VI. Reflections & Conclusions .....	564
Appendix 1: Client Packets Excerpts.....	566
Appendix 2: Excerpt from Research File .....	580
Appendix 3: Excerpts from Annotated Form LOI.....	582
Appendix 4: Issue Identification Grid.....	584
Appendix 5: Question Sets .....	585
Appendix 6: Grading Grid .....	586
Appendix 7: LOI Evaluation.....	587

### *I. Introduction*

Experiential learning is intended to contextualize studying the law and equip students with lawyering skills required in practice. “Experiential education integrates theory and practice

by combining academic inquiry with actual experience.”<sup>1</sup> From a pedagogical perspective, LLC-based experiential exercises provide an efficient vehicle to teach the traditional doctrinal foundation of LLCs such as the unique attributes of the entity i.e., limited liability with pass-through taxation and flexible management structures), the default statutory rules that govern LLCs, and a host of transactional skills.

Teaching unincorporated business entities, particularly LLCs, presents a unique platform to design a course—or a course element—to provide students with opportunities to integrate doctrine and skills while developing students’ professional identities.<sup>2</sup> This Article discusses how I use client-based problems to introduce students to the default rules of LLCs and other unincorporate entities<sup>3</sup> and to develop skills such as problem solving, drafting, and negotiation, as well as to cultivate students’ ethical and professional identities.

---

1. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 121–22 (2007); *see also* WILLIAM M. SULLIVAN ET AL., SUMMARY OF EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 9 (2007), [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf).

2. *See* Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished, or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 104 (2012) (citing Richard A. Matasar, *The Two Professionalisms of Legal Education*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 99, 114 (2001)).

[I]nstitutional commitment to professionalism ensures the infusion of professional identity instruction throughout the curriculum. . . . Scholars have commented that the concepts of professionalism are most effectively addressed (and incorporated into students’ behavioral norms) when they are integrated in all coursework (doctrinal and experiential) during the entire three years of law school.

3. *See* Larry E. Ribstein, *The Uncorporation and Corporate Indeterminacy*, 2009 U. ILL. L. REV. 131, 133 (2009)

Uncorporate business forms rely on specific contractual devices to provide incentives and managerial discipline, reducing their need to rely on monitoring devices such as owner voting, independent directors, fiduciary duties, and derivative litigation. The parties, therefore, can tailor their contracts to their needs, and courts do not need to develop fiduciary rules to deal with a multitude of situations. It follows that indeterminacy is less likely to be a problem in unincorporate than in corporate cases.

In this Article, I describe the elements, goals, outcomes, and applications of an experiential exercise that helps students understand how lawyers use the substantive law of LLCs when negotiating business transactions and drafting documents to memorialize business deals.<sup>4</sup> While this Article focuses on exercises developed using LLCs, the exercise format can be adapted for most business law courses and many other courses offered in the law school curriculum.

Part II of this Article briefly articulates why LLCs provide a robust platform for developing experiential exercises. Part III describes an LLC-focused experiential exercise and supporting materials, group assignments, discussion aids, and assessment models. Using the example exercise, Part IV of this Article discusses the skills involved in the exercise and the pedagogical goals and outcomes served by these exercises. Recognizing that the experiential exercises take considerable faculty time and effort, Part V addresses modifications and suggestions for how to incorporate limited components of the exercise in a general survey or upper-level course and thoughts on how to tailor experiential exercises to an individual syllabus. The Article concludes with brief reflections on teaching the law of LLCs through experiential exercises. Materials involved in assigning and the assessment of the exercise are provided in appendices to this Article to encourage readers to adopt and adapt the exercises to the unique needs of their courses and students.

## *II. Good Bedfellows: LLCs and Experiential Exercises*

To enhance the reality of client-representation simulations,<sup>5</sup> business planning classes should consider focusing on the LLC

---

4. I have developed three experiential learning exercises that I use in my Unincorporated Business Associations (UBA) course: a partnership agreement, a letter of intent to form an LLC and complete an asset purchase agreement, and a buy-out agreement. This Article discusses only one of those exercises: the letter of intent assignment.

5. Simulation-based courses in which “students assume professional roles and perform law-related tasks in hypothetical situations” is one of three traditional models of experiential education where the primary mode of instruction is experiential learning. See STUCKEY ET AL., *supra* note 1, at 122 (comparing simulation-based courses, in-house clinics, and externships).

format, but of course the exercise format and method described herein can be used in any transactional course. LLCs are particularly well suited to experiential exercises for a number of reasons. First, filings for new LLCs outpace filings for new corporations in many jurisdictions.<sup>6</sup> Thus, students need to be familiar with LLCs as an entity form that they are likely to address with clients in various stages of the business planning process. Second, LLCs are creatures of contract that rely on the privately negotiated agreement of the owners to shape and form the contours of the entity's basic rights and obligations. Thus, efficiently functioning LLCs often require careful guidance from legal advisors about how to best achieve their business objectives by selecting and documenting the appropriate management structure, exit rights, and financial obligations in the operating agreement<sup>7</sup> and possibly other ancillary agreements. Third, the statutory default rules of LLCs rely on the existence of these agreements between the owners<sup>8</sup> and courts defer to privately negotiated terms to shape the rights and responsibilities of owners.<sup>9</sup> Because of the role of private agreements in the

---

6. For example, the number of domestic LLCs active in Georgia is 332,486, and the number of domestic profit corporations is 204,789. *Corporations Division*, GA. SECRETARY OF ST., <http://www.sos.ga.gov/corporations/stats.htm> (last visited Nov. 5, 2013) (on file with the Washington and Lee Law Review). In New York, LLCs are the second most commonly formed business entity with 839,155 corporations and 568,761 LLCs operating in the state. See Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 36 (2004).

[T]he growing predominance of LLCs was obvious by 2002, when they comprised a majority of new business filings in 19 states and made up 41.84% of business filings nationwide. By 2003, the predominance of LLCs was unquestionable. In that year, more LLCs than corporations were formed in 29 states. In 11 other states where corporations predominated, over 45% of new business filings were for LLCs.

7. See, e.g., DEL. CODE ANN. tit. 6, § 18-101(7) (2013) (describing the operating agreement as “any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written, oral or implied, of the member or members as to the affairs of a limited liability company and the conduct of its business”).

8. See *id.* § 18-1101(b) (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”).

9. See, e.g., *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 852 (Del. Ch. 2012)

[T]he [Delaware Limited Liability Company Act] . . . allows the

governance of LLCs, students should learn to go beyond the default rules and template agreements to carefully consider which terms and conditions would best balance owners' interests, promote efficient governance, and help achieve the owners' vision for the business. The prevalence of LLCs and the role that attorneys play in forming and advising them warrant careful examination in class both through traditional doctrinal pedagogy such as deconstructing statutes and reviewing appellate opinions as well as through the application of that doctrine to client simulations.

Finally, the hybrid nature of LLCs, which straddle the legal line between corporations and partnerships,<sup>10</sup> extends the impact of lessons learned as they are likely to be applicable to more than one entity form. LLCs are the chameleon of business entities in that they can move along the continuum resembling partnerships in some settings and acting more like corporations in others.<sup>11</sup> LLC statutes provide for an alternative voting and control framework, one that mirrors the centralized control of corporations, to govern an entity if its owners elect the alternative in the operating agreement. Otherwise, LLC statutes apportion control among all owners in a more egalitarian manner

---

parties to an LLC agreement to entirely supplant those default principles or to modify them in part. Where the parties have clearly supplanted default principles in full, we give effect to the parties' contract choice. Where the parties have clearly supplanted default principles in part, we give effect to their contract choice.

(citations omitted)

10. See, e.g., Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 447 (2002) ("To ensure compliance with the Kintner Regulations, some states adopted 'bullet-proof' statutes, which mandated that a LLC could have only two corporate characteristics—limited liability and centralized management. As a result, LLCs were truly hybrid entities, and sometimes analogized to the limited partnership."); Michael J. Garrison & Terry W. Knoepfle, *Limited Liability Company Interests As Securities: A Proposed Framework for Analysis*, 33 AM. BUS. L.J. 577, 577 (1996) ("What is an LLC? It is a hybrid entity that combines the best characteristics of partnerships and corporations."); Geoffrey Christopher Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 J. CORP. L. 1063, 1066 (2006) ("If the LLC is a hybrid in any meaningful sense, it would seem logical that its legal treatment would fall somewhere in between the partnership and the corporation." (citing Robert B. Thompson, *The Taming of Limited Liability Companies*, 66 U. COLO. L. REV. 921, 921 (1995))).

11. *Infra* note 12.

mirroring the default management balance set in partnership law. Aside from publicly owned corporations, which are in many ways their own beasts in business law,<sup>12</sup> the planning process for LLCs mirrors the process used with closely held corporations and partnerships in teasing out from the owners how to value contributions, apportion voting rights, define fiduciary duties, and allocate profits and losses. Because LLC statutes contemplate that these entities can easily shift between these two extreme ends of the entity spectrum, exercises involving LLCs create lessons transferable to other entities.

### *A. Teaching Doctrine Through LLC Experiential Exercises*

In my first year of teaching, I struggled to develop a compelling narrative for students as to why they should enroll in both the traditional corporations<sup>13</sup> class and UBA class to which I was assigned to teach. Unfortunately, the UBA course felt like simply a continuation of what was done in corporations, with greater attention paid to learning the controlling statutes or uniform rules. In my UBA classes, we dissected the default rules applicable to partnerships, limited partnerships, LLCs, and other

---

12. See, e.g., Christyne J. Vachon, *Double Dutch: Teaching Business Associations in Two Semesters*, 8 J. BUS. & TECH. L. 213, 214 (2013) (providing that students study “closely held business entities in Business Associations I, starting with agency law and covering the law of partnerships, LLCs, and corporations. Business Associations II addresses public entities, focusing substantially on the public corporation” (citations omitted)).

13. At Georgia State University College of Law, Corporations is a three-hour elective class available to 2nd and 3rd year law students. The subject is also listed as Business Associations at many law schools and is three or four course credits. See, e.g., Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. & TECH. L. 175, 175–76 (2013)

[T]he Business Associations course—variously named at U.S. law schools—is important to the practice of law and, therefore, the program of legal education in the United States. Many students take the course. It is a course covered on state bar examinations. The theory, policy, and doctrine relating to business enterprises is significant in many different practice settings and, to some extent, is essential to (or at least useful in) life outside the legal profession. (citations omitted).



hybrid business entities<sup>14</sup> as well as read appellate opinions that interpreted these rules. Through these traditional teaching methods, I attempted to shed light on ambiguities in the statutory rules and to help students understand how unincorporate businesses operated. Despite these efforts, UBA seemed unfocused and individual classes felt listless, eliciting minimal discussion from students. I quickly realized that I wanted to convey the business planning and client counseling components of the course in client simulations, providing opportunities for students to apply the law and practice the skills that were previously only discussed. This revelation began the evolution of the course from a traditional doctrinal course to the blended doctrinal and experiential course that it is today.

As with most pedagogy decisions, there are costs and benefits associated with conveying doctrine through experiential exercises. The benefits are highlighted in this Article, and I believe that the payoff is positive. The biggest cost is time—class time that can be dedicated to broader coverage of unincorporate forms and related themes such as agency liability. Over the six semesters of teaching this course, I have reduced casebook reading coverage by approximately forty-five pages but have added skills-focused reading as a replacement. Of course, class coverage of the readings has changed with fewer concepts addressed solely in lecture and more explication happening in small group discussions and through assignments. Additionally, there are professor-time costs in creating experiential exercises, grading them, and incorporating feedback from students into future exercises.

LLCs, like all business entities, are subject to state statutes, which create default rules establishing the minimum (or maximum) rights and responsibilities of the owners. This off-the-rack or one-size-fits-all approach works in some, but not all, situations and business contexts between owners. The statutory default rules establish a preset balance of rights and duties between owners—one that is intended to reflect the average bargain owners would strike if they had prenegotiated the issue.<sup>15</sup>

---

14. The limited liability limited partnership is an example of another hybrid entity form covered in UBA.

15. See, e.g., Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71, 108 (1989).

While most of the default rules are “unless otherwise agreed” and therefore subject to variation by the terms of a private agreement, some of the rights fixed by the default rules, such as minimum fiduciary duties, are unalterable.<sup>16</sup>

Understanding the balance of rights and obligations between owners created by the statutes as well as the role of private agreements in forming the governance structure for LLCs is the primary teaching challenge in UBA and the goal of my experiential exercises. For students to understand the impact of having predetermined and balanced rights between owners requires students to understand when the default statutory rules should be altered. These points can be discussed in lecture alone, but are better to be illustrated, tested, and applied. Wanting students to see why the content of the default rules mattered, the best vehicle<sup>17</sup> was to have students work with and around the default rules themselves.<sup>18</sup>

Having identified this learning outcome,<sup>19</sup> I began building client simulations and the course materials to achieve these

---

A better approach [to interpreting corporation statutes] uses a “market substitution” or “hypothetical bargain” technique to interpret broad statutory provisions in corporate law. This approach derives from the premise that corporation law is fundamentally a default bargain that reduces contracting costs. Thus, gaps in the statute should be interpreted to provide contract terms that most firms would have entered into in the absence of transaction costs and to facilitate customized bargains.

(citations omitted).

16. See, e.g., Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537, 583–84 (1997) (discussing the default rules of partnerships as well as the preformation duties that apply regardless of contractual agreements).

17. See, e.g., Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 NORTHEASTERN U. L.J. 87, 89–97 (2013) (describing the value of experiential learning, highlighting in particular why experiential learning presents a superior platform over lecture to teach doctrine).

18. See L. DEE FINK, *CREATING SIGNIFICANT LEARNING EXPERIENCES: AN INTEGRATED APPROACH TO DESIGNING COLLEGE COURSES* 74 (2003) (“Application: an ability to use and think about the new knowledge in multiple ways, as well as the opportunity to develop important skills.”).

19. Educational outcomes reference priorities for what students should “know and be able to do and the perspectives and values that should shape their work.” Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL.

ends.<sup>20</sup> The problems expanded from one or two week exercises with minimal supporting materials to the current iteration of the course where simulation problems are incorporated into twelve of the fourteen weeks of the semester. The shift in methodology transformed deconstructing statutes from a passive endeavor to an active learning exercise where students had to understand and apply the statutes to achieve an assigned client objective.

### *B. Teaching Skills Through LLC Experiential Exercises*

LLCs provide a ripe field for business planning issues and conflicts that explicate the delicate balancing of rights and duties of owners. Framing the business planning discussion in the context of negotiations and a required written work product elevates the hypothetical from the abstract to the concrete.<sup>21</sup> Through the process of reducing a concept into clearly articulated language as a part of a cohesive and coherent written document, students distill information and master new skills.<sup>22</sup> In a blended course:

---

U. L.J. 225, 228 (2010) (citing GREGORY S. MUNRO, OUTCOME ASSESSMENT FOR LAW SCHOOLS 50 (2000)).

20. See *id.* at 237

“[T]he best teachers plan backward; they begin with the results they hope to foster.’ After the course outcomes have been determined, the professor would design the assessments that would measure how well the students are achieving the course outcomes and then would plan the course materials and teaching and learning strategies that would prepare students to achieve the outcomes.(quoting KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO 50 (2004)) (citing FINK, *supra* note 18, at 63)).

21. See Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum through Experiential Learning*, 51 J. LEGAL EDUC. 51, 72 (2001) (“Experiential learning exercises . . . require students to apply their understanding of the doctrinal concepts. Any confusion or lack of understanding is likely to be readily apparent. Especially when performed in small groups, with an accompanying written component, such exercises can be a useful form of classroom assessment.”); Erickson, *supra* note 17, at 96

If I want my students to be able to use agency law to advise clients on how to structure their businesses, then I need to ensure that my students practice applying the law in this context. . . . [I]t is experiential learning for the sake of accomplishing the specific learning objectives for the course.

22. See STUCKEY ET AL., *supra* note 1, at 125

[A] primary goal of legal education is to help students begin

Experiential modules help students connect the content of the substantive material with the use of the substantive material, thereby fostering active student learning and further developing students' abilities to be critical and creative thinkers. Also, by connecting the substantive material, taught in the lecture class, to the real world of practice, experiential modules may help motivate students to learn the substantive material that we are trying to teach them.<sup>23</sup>

Incorporating transaction-focused client simulations in doctrinal courses contribute to the law school curriculum by providing an opportunity to (1) think *ex ante*; (2) engage in risk assessment; (3) draft legal documents; and (4) practice problem-solving negotiations.<sup>24</sup> Additionally, experiential transactional exercises provide an opportunity for students to gain exposure to and experience with ethical issues, contract components, client counseling and interviewing, and financial literacy.<sup>25</sup> Blended courses engage students in the process of "developing lawyering skills, cultivating professional identity, fostering professional ethics, providing culturally competent client representation to a diverse array of clients, developing sound judgment and problem-solving abilities, gaining insight into law and the legal system, promoting lifelong learning, and learning to work collaboratively."<sup>26</sup>

---

developing expertise in solving legal problems. All forms of experiential education involve problem-based learning, so one of the strengths of experiential education is that it gives students opportunities to practice solving problems and to receive feedback on the quality of their efforts.

23. Heather M. Field, *Experiential Learning in a Lecture Class: Exposing Students to the Skill of Giving Useful Tax Advice*, 9 PITT. TAX. REV. 43, 54–55 (2012).

24. See Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J.L. MED. & ETHICS 375, 375 (2009) (highlighting issues that are important to transactional practice).

25. See, e.g., Kenneth N. Klee, *Teaching Transactional Law*, 27 CAL. BANKR. J. 295, 303 (2004) (providing the results of his transactional teaching survey to identify what types of skills are taught in transactional law courses at law schools).

26. Deborah Maranville, *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517, 527 (2011).

### *III. Example of a Negotiated and Drafted Agreement Experiential Exercise: Letter of Intent to Form an LLC and Complete an Asset Purchase Agreement*

Experiential exercises challenge professors because they often draw upon skills, competencies, and concepts with which students have varying degrees of exposure, comprehension, and comfort. Additionally, in blended courses, professors cannot lay a foundation for all of the discreet components of and concepts in the exercise. To empower students to take the leap from passively reading about the law to actively applying it in client-based simulations, careful thought must be put into how to support students. The following discussion conveys my best attempt at appropriately balancing doctrinal foundations with experiential applications.

Incorporating experiential exercises into a doctrinal course requires a practice simulation problem, supporting resources for the students to master the skills, classroom lecture and support, and assessment models to evaluate work.<sup>27</sup> In this Part, I describe a multi-week LLC-focused experiential learning exercise; however, the model described herein can be used in virtually any blended course. Specific contributions of this Article to the literature on transactional pedagogy include the use of co-counsel teams,<sup>28</sup> joint grading rubrics, and issue identification grids. The

---

27. See STUCKEY ET AL., *supra* note 1, at 122 (describing the critical requirements of experiential learning modules); Field, *supra* note 23, at 54–57 (describing the “integration of experiential components . . . into lecture classes”); Stefan H. Krieger & Serge A. Martinez, *Performance Isn’t Everything: The Importance of Conceptual Competence in Outcome Assessment of Experiential Learning*, 19 CLINICAL L. REV. 251, 275 (2012) (“[A]ssessment must consider not only a learner’s performance, but also the cognitive processes revealed during that performance.”); Maranville, *supra* note 21, at 72–74 (describing the classroom assessment and feedback components of experiential exercises in doctrinal courses); Ira Steven Nathenson, *Best Practices for the Law of the Horse: Teaching Cyberlaw and Illuminating Law Through Online Simulations*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 657, 675 (2012) (“Simulations should be used for objectives that can best be obtained through experiential education.”)(citing STUCKEY ET AL., *supra* note 1, at 168)).

28. Carol D. Newman discusses a different form of co-counsel teams in W. David East et al., *Teaching Transactional Skills and Tasks Other Than Contract Drafting*, 12 TRANSACTIONS: TENN. J. BUS. L. 217, 233 (2011)

Unit 3 is a four-week simulated transaction, where student pairs play the roles of co-counsel, while we professors play the roles of the

materials used in this exercise are set forth in the Appendices at the end of this Article.

### *A. The Problem Set Up*

In this exercise, Client A and Client B, both LLCs, want to join forces to create a new company that will own and operate a restaurant currently owned exclusively by Client B. Clients A and B have agreed in principle to form a new LLC, which will purchase the restaurant assets from Client B. An Operating Agreement will be required to form the new LLC and an Asset Purchase Agreement will be required to complete the sale of the restaurant's assets. To assist their clients in this transaction, students negotiate a Letter of Intent (LOI)<sup>29</sup> establishing the key terms of this transaction.

#### *1. Opposing Counsel & Co-Counsel Groups*

In this thirty-student class,<sup>30</sup> each student represents either Client A or Client B, creating fifteen teams and final work

---

clients. In Unit 3, students practice the skills and use the knowledge that they have developed in Units 1 and 2. They learn about a business deal from us, in our roles as clients. They have to consult with us as clients. They work on negotiation strategy charts. They give us, as clients, verbal reports as well as written updates about the status of their deal. They have to ask us what we, as clients, want to do as the negotiations develop.

29. For more information on letters of intent, see Kathryn Cochrane Murphy, ALI-ABA Course of Study, LETTERS OF INTENT, SL017 ALI-ABA 225 ("[An LOI] is used to memorialize a basic agreement and to flush out any potential deal-breaking issues early in the negotiating process. Often, [LOIs] are used . . . to focus the parties on open issues, increase efficiency and indicate willingness to negotiate diligently and in good faith." (citing Thomas C. Homburger & James R. Schueller, *Letters of Intent—A Trap for the Unwary*, 37 REAL PROP. PROB. & TR. J. 509, 511, 512 (2002))); see also James J. Gettel, *Letters of Intent in Corporate Acquisitions*, 61 WIS. B. BULL., 25-26 (1988) ("Letters of intent frequently are prepared to reflect basic terms of an acquisition prior to preparation of a formal agreement and closing.").

30. I have taught this course to various class sizes ranging from twenty to nearly fifty students. Capping class enrollment at thirty students keeps the grading manageable with fifteen final agreements. Thirty students, as opposed to twenty or fifty students, also provides a balanced classroom discussion so that students can frequently participate in statutory rule and case discussions

products. All students representing Client A are assigned to one of two “co-counsel” groups. The same is true for each student representing Client B. As explained in more detail below, the “co-counsel” groups provide students with the real-life experience of working collaboratively with others in a firm to serve their clients. Drawing on strategies discussed in co-counsel groups, each student works one-on-one with an assigned “opposing counsel” to reach an agreement and reduce it to writing.

## 2. Materials

Students receive the following materials to facilitate comprehension of the proposed transaction, client representation, and completion of the final LOI.<sup>31</sup>

### a. Client Packet

Students receive client packets, available at Appendix 1,<sup>32</sup> containing general background regarding the proposed transaction as well as confidential Client information that may

---

without being overburdened with the responsibility to carry the discussion or conversely be overshadowed by the participation of others. Thirty students also creates four co-counsel groups of an appropriate size so that there is productive discussion (because there are not so many students that work is impeded) and an appropriate smoothing effective (because there are enough students assigned to each group that there can be a transfer of knowledge, experience, and perspective among the members of the co-counsel). Finally, this class size allows me to communicate with each co-counsel group and each opposing-counsel team during in-class meetings, whereas a larger class size would require a different approach. For a discussion on class size with transactional courses see Klee, *supra* note 25, at 305 (“In my experience, generally transactional courses have smaller enrollments than non-transactional courses: . . . [T]ransactional courses are smaller, on average, than other courses.”).

31. As needed, the materials are updated to reflect legal advances and to incorporate student feedback. For the most part, however, the structure of the problem remains the same year to year. To minimize the need to reinvent the problem materials each year, the course policy includes the requirement that students not share client packets or drafting notes if they provide their course materials (notes, outlines, etc.) to future enrollees of the course. See also the confidentiality disclaimer on the confidential client instructions in Appendix 1. *Infra* Appendix 1, at 60, 66.

32. *Infra* Appendix 1.

shape or influence the negotiations and outcomes.<sup>33</sup> The client packet also states the objectives of the exercise and provides a detailed description of the assignment components broken down week-by-week.<sup>34</sup> Additionally, the packet informs students which deal points are settled between the parties and which remain open for negotiation.<sup>35</sup> For example, in the LOI problem, the purchase price for the restaurant is agreed to in principle, but students negotiate the management structure of the new LLC and the closing conditions of the Asset Purchase Agreement.<sup>36</sup> Confidential information regarding the Client's preference, preferred outcomes, and priorities assists students in negotiating open issues. Confidential client information also serves as a proxy for information that would be gleaned from interviews in a live-client setting. In structuring the client packets, the amount of detail to include is always a delicate balancing point. With increased detail comes increased complexity and resources required to complete the assignment. On the other hand, increased detail and factual information increases the sense of reality for the simulation.<sup>37</sup> Any professor incorporating experiential exercises into a blended course will have to strike the balance appropriate for their students, topic, and time constraints.

*b. Annotated Form Letter of Intent*

As is consistent with the practice of law, students do not start from scratch on drafting assignments.<sup>38</sup> I provide students

---

33. Best practices for simulation courses include professors providing "students with relevant instructional materials and lessons to enable them [to] develop 'espoused theories of action' and deliberately design our simulations and feedback mechanisms to help achieve the desired educational goals." STUCKEY ET AL., *supra* note 1, at 135.

34. *Infra* Appendix 1.

35. *Infra* Appendix 1.

36. *Infra* Appendix 1.

37. See Maranville, *supra* note 21, at 68 ("Typically there is a tradeoff between detail and manageability, in the form of narrowing the issues and the complexity of the simulation. Detail can play an important role in creating a sense of reality that will engage the students and provide a useful level of lawyering-task context.").

38. See Todres, *supra* note 24, at 377 ("Transactional law, like all areas of



with an electronic, sample Letter of Intent that is annotated with my comments on how to tailor the document to the transaction contemplated in the problem. The Annotated Letter of Intent is available at Appendix 3.<sup>39</sup>

### *c. Research File*

Students also receive a research file providing additional information about doctrinal concepts underlying the exercise. The Research File supplements class assignments and discussions and is intended to help students without a strong business background feel comfortable providing business planning advice and transactional counseling to their fictitious clients. The Research File also models the practice-based approach where deal terms are often researched so that attorneys can identify common provisions for certain types of deals, gauge the enforceability of terms, and select appropriate options in drafting.<sup>40</sup> The Research File helps illustrate the need for transactional lawyers to engage in substantive legal research in order to comprehend the relevant law underlying the transaction and the common types of contract provisions that can protect a client's interests. This helps counter the misconception that transactional practice is really just a matter of "fill in the blank." For example, the Research File discusses LOIs and the different

---

law, draws upon precedents to enhance efficiency, improve quality of work, and save clients' money, but a good lawyer can draft precise, effective legal language on the spot and also understands the law that undergirds why a provision is drafted a certain way.").

39. *Infra* Appendix 3.

40. See, e.g., *2011 M&A Deal Terms Study*, S'HOLDER REPRESENTATION SERVS., <https://www.shareholderrep.com/resource/2012-srs-ma-deal-terms-study/> (last visited Nov. 16, 2013) (providing a form for the Deal Terms Study) (on file with the Washington and Lee Law Review); *SRS Deal Terms Study Reveals New M&A Benchmarks and Trends*, BUSINESS WIRE, Nov. 2, 2011, <http://www.businesswire.com/news/home/20111102005813/en/SRS-Deal-Terms-Study-Reveals-MA-Benchmarks> (last visited Nov. 16, 2013) (providing a study of M&A transactions) (on file with the Washington and Lee Law Review); see also Christina L. Kunz et al., *Incorporating Transactional Skills Training into First-Year Doctrinal Courses*, 2009 TRANSACTIONS: TENN. J. BUS. L. 331, 338 (2009) ("[A] great deal of the law of contracting is not actually found in cases and statutes, but rather in the contracts themselves. The rules governing any contract dispute come from two sources: the law and the contract. Students need to learn how to interpret both.").

purposes they serve if your client is the buyer or a seller in a transaction. The Research File for this assignment also provides general information regarding Asset Purchase Agreements, Exclusivity Agreements, Employment Agreements, Non-Compete Agreements, and Break-up/Termination Fees. An excerpt of the Research File is available at Appendix 2.<sup>41</sup>

### *B. Assignments*

Experiential exercises that result in a complex final work product, like the LOI, are best approached in incremental assignments that break down the writing process into manageable components.<sup>42</sup>

#### *1. Question Sets*

Students' first assignment is to complete question sets, which are designed to help students (i) identify and understand the proposed transactions, the settled deal points, and the items open for negotiation; (ii) identify client objectives and prioritize negotiation issues; and (iii) examine embedded ethical questions such as who is the client.<sup>43</sup> Students explore these questions in their co-counsel small group discussions. The question sets are included in the LOI Client Packets and are highlighted in Appendix 5.

#### *2. Issue Identification Grid*

Students are also expected to complete an issue identification grid walking through the major open issues of the Operating

---

41. *Infra* Appendix 2.

42. See Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. REV. 395, 426 (2012) ("[T]eachers guide learners in mastering complex knowledge in small steps. This important idea of 'scaffolding,' taken from learning theorists, supports such efforts at improved performance over time."); Erickson, *supra* note 17, at 94–96 (discussing the levels and process of knowledge acquisition).

43. For example, is the client the LLC as a whole organization or the head of the LLC?

Agreement for the new LLC and the open items on the Asset Purchase Agreement to be included in the LOI. The issue grid asks students to identify their client's maximum and minimum position with regard to each open issue as well as the other client's likely position on or interest in the issue. The issue grid models the preparation that transactional attorneys complete before important negotiations.<sup>44</sup> Assigning the issue grid ensures that students show up for both co-counsel and opposing counsel negotiations prepared and ready to work. The issue grid also helps students organize their thoughts for negotiation and formulate a framework for negotiation by understanding the full scope of issues, how they are interrelated, the room for negotiation on each issue, and the priority of the issues for their client. The complete Issue Identification Grid is available at Appendix 4,<sup>45</sup> and an excerpt is provided below.

	<b>Client's Ideal</b>	<b>Client's Min/ Max</b>	<b>Notes &amp; Arguments</b>	<b>Final Decision<sup>46</sup></b>
<b>Ownership Interest</b>				
<b>Management</b> Member or Manager managed? How structured? Control? Deadlock?				
<b>Fiduciary Duties</b> Members? Managers? Competition?				

---

44. See, e.g., Kunz et al., *supra* note 40, at 334 ("[T]he third [transactional] skill is to spot problems with the client achieving her goals and to come up with ways to alter the terms of the contract between the parties to address these problems.").

45. *Infra* Appendix 4.

46. This column is left blank until after opposing counsel negotiations. Students are asked to bring two copies of this grid to class: one to turn in and one to use in negotiations.

The issue grid, which students complete from their client's perspective, includes space for students to brainstorm about drafting solutions for each issue. For example, students address how to tailor fiduciary duties so that existing restaurant operations of Client A do not breach the duty of loyalty owed to a new member-managed LLC of which Client A will be a member. Finally, the issue grid provides space for students to memorialize their agreements with opposing counsel during negotiations and can be used to assist in drafting and editing the final LOI. Issue grids allow students to make requests and demands in negotiations with a justification in terms of their client's interest, and possibly even the other party's interests, as well as to make informed concessions to requests made by opposing counsel.<sup>47</sup>

For example, students evaluating the issue grid interim assignment during the Fall 2013 semester routinely assigned the exercise four or five points out of five and provided feedback such as "[i]t was helpful to see issues that I might not have thought of on my own."<sup>48</sup> Another student responded that the LOI issue grid "was useful to identify potential contentious negotiations points and have a plan to . . . address[] them."<sup>49</sup>

### *3. Partial, Initial Drafts*

Student teams turn in an initial, partial draft of the final work product. Students complete the introduction and paragraphs 1–4 of the LOI, which identify the parties, describe the transactions, and establish the basic framework for the deal by stating the management and the business scope of the new LLC. The initial, partial assignment requires students to overcome the inertia of not drafting, gives them early feedback on formatting and defined terms, and also serves as a check to make certain that students comprehend the proposed transaction.<sup>50</sup> The

---

47. RICHARD K. NEUMANN, JR., *TRANSACTIONAL LAWYERING SKILLS: CLIENT INTERVIEWING, COUNSELING AND NEGOTIATION* 21–26, 112 (2012) (discussing how students can develop a problem-solving style in negotiations).

48. Student assessment on file with author.

49. Student assessment on file with author.

50. See Maranville, *supra* note 21, at 72

Experiential learning exercises integrated into the traditional

initial draft also assists students to identify potential communication and working relationship issues as they work with opposing counsel. Finally, the initial, partial assignment functions as a reminder about the time and attention required to produce a final draft of a negotiated agreement.

Piecemeal assignments giving students low-stakes feedback (in other words, few points attached to the assignment) on their progress supports students as they undertake the difficult and daunting task of acquiring new skills.<sup>51</sup> Assessments of the initial drafting assignment, described below, have elicited responses such as “I value getting feedback because it guides me in the right direction and helps me understand the small things that I should/should not do.”<sup>52</sup> Another student commented that it was “helpful to break up the amount of work due at the end. It also gave us an easy transition into working without opposing counsel, which would have been more helpful if I didn’t already know [opposing counsel].”<sup>53</sup> Finally, as the specific transactional skill of drafting and comprehension of the fact pattern, one student commented that the initial draft was “[g]reat to see how the wording needed to be done in terms of when to use members v. parties as well as all of the different entities involved in the assignment”.<sup>54</sup>

### *C. Classroom Support*

This experiential exercise takes five weeks from introduction to evaluations. The LOI assignment coincides with the course

---

classroom require students to apply their understanding of the doctrinal concepts. Any confusion or lack of understanding is likely to be readily apparent. Especially when performed in small groups, with an accompanying written component, such exercises can be a useful form of classroom assessment.

See also Erickson, *supra* note 17, at 99 (discussing how “learning-oriented teaching” uses assessments so students can “assess their own progress in meeting the learning objectives for the course”).

51. See Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69, 81 (2009) (“This progression—the greater and greater depth—is important because it makes experiential learning more likely to succeed.”).

52. Student assessment on file with author.

53. Student assessment on file with author.

54. Student assessment on file with author.

coverage on LLCs and corresponds with students learning the statutory default rules of LLCs, reading cases that explicate the planning problems, and general classroom discussion about tailoring Operating Agreements and other contract-based solutions. Aside from casebook and statutory materials, I provide lecture content and assigned supplemental reading outside of the casebook<sup>55</sup> regarding the role, content of and issues related to letters of intent and asset purchase agreements. Classroom discussion often references components of the Research File discussed above.

To introduce the experiential exercise to the students, I set up the facts of the problem, identify new transactional concepts and skills included in the assignment, assign students to clients, and facilitate co-counsel and opposing counsel introductions. For the remaining weeks, the class begins with a discussion of LLC default rules and case application supported by the casebook and statutes. The class then transitions to the experiential exercise through lecture and discussion of the transactional components of the assignment such as a discussion on negotiation techniques or drafting representation and warranties in the asset purchase agreement. This portion of the class is supported by a transactional skills book<sup>56</sup> or supplemental readings.

In a typical two-hour-and-thirty-minute class<sup>57</sup> following this format, eighty minutes are devoted to doctrinal lecture and transactional components and skills are discussed for twenty minutes. Co-counsel and opposing counsel meetings consume the remainder of class time, which ranges from thirty minutes total the first week of the problem to sixty minutes the week before the final draft is due. During co-counsel meetings, which typically last twenty to thirty minutes,<sup>58</sup> I check in with each co-counsel discussion group to help them identify issues, brainstorm

---

55. LARRY E. RIBSTEIN & JEFFREY M. LIPSHAW, UNINCORPORATED BUSINESS ENTITIES (4th ed. 2009).

56. See generally, e.g., NEUMANN, JR., *supra* note 47.

57. UBA is a once-a-week course offered for three credit hours that meets for two hours and forty-five minutes with a fifteen-minute break.

58. The time reflects the time necessary for me to meet with the four co-counsel groups to discuss the assigned problems, answer assignment questions, and brainstorm about negotiation strategy for the upcoming opposing counsel meetings.

drafting solutions, and answer any questions about the assignment. Similarly, during opposing counsel negotiations, I rotate around the room speaking with each opposing counsel team to answer any questions they may have and provide support.

Over the five weeks of the assignment, I also reference and make available to students examples of provisions from LOIs from past semesters. For example, when students learn fiduciary duties, we examine several different sample fiduciary duty provisions from old LOIs. The examples illustrate solutions and pitfalls in the substance of the assignment such as tailoring the default rules. They also serve as reminders about drafting requirements such as the consistent use of defined terms. Finally, student examples emphasize important deal points, like when and how to make LOI provisions binding.

#### *D. Assessment and Feedback*

The goals of experiential exercises include reinforcing and contextualizing doctrinal principles of law and facilitating the acquisition and reinforcement of lawyering skills.<sup>59</sup> Assessments of experiential assignments should reflect those goals. Unlike an exam where obtaining a natural curve may be part of the desired outcome when drafting the exam, facilitating all students' mastery of the substance and skills should be the desired outcome with experiential exercises.<sup>60</sup>

The LLC LOI assignment is worth approximately 15% of each student's final grade.<sup>61</sup> Students receive formal feedback at three stages in the LLC LOI assignment. They receive individual participation points (up to three) for completing the assigned Issue Identification Grid. Additionally, each opposing counsel

---

59. See Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 HAMLINE L. REV. 555, 555 (2007) (describing the goals of experiential learning).

60. Formative assessment would facilitate mastery of the skills. See Fisher, *supra* note 19, at 238–39 (“Formative assessment measures provide students with feedback to help them improve their performance. These assessments need not be scored, and they are not used to assign course grades.”).

61. The three experiential exercises combined comprise 35% of each student's final grade in my UBA class.

team receives a joint score on the Initial Partial Draft. Because this interim assignment is intended to provide feedback and check comprehension of the transactions by the student attorneys, it is a low-score assignment, usually worth no more than five points.<sup>62</sup> The final LOI that the teams complete is worth up to 30 points; each team receives a joint grade.<sup>63</sup> An assessment grid is completed for each team's LLC LOI and a joint score assigned.<sup>64</sup>

When the Client packets are distributed to students, the assessment or grading grid (see Appendix 6) is made available to students to communicate expectations of and requirements for the final work product. Transparency regarding assessment is intended to help assuage students' anxiety about receiving grades for their drafted work product and working in assigned teams.<sup>65</sup>

Students also evaluate the assignment structure, materials provided, and in-class support.<sup>66</sup> This level of student-based assessment allows me to identify successful components of the

---

62. Interim, low-stakes feedback with the partial drafts falls into the category of formative feedback that is "provided to students to help them improve their performance" as opposed to summative feedback where the objective is to assign a score. Field, *supra* note 23, at 91; *see also* MARY J. ALLEN, *ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION* 9 (2004); (discussing academic programs); STUCKEY ET AL., *supra* note 1, at 255 (discussing the distinction between formative and summative assessments); Fisher, *supra* note 19, at 239 (discussing the benefits of formative assessment measures).

63. While the clients are characterized as "opposing," they have many overlapping interests in this simulated transaction, as clients do in real life. The facts are structured so that Clients A and B have points of mutual agreement such as with the anticipated ownership percentage. Client A wants 70–90% and Client B wants 20–40%. An appropriately negotiated final LOI would reflect ownership percentages for Client A at 70–80% and Client B at 20–30%.

64. *See* Fisher, *supra* note 19, at 240–41

Summative assessment measures should be returned with comments and explanations that help students understand how to improve their performance so that summative assessments would also serve a formative purpose. An easy way to provide explanatory information to students is via rubrics, which are grids that list the criteria used to evaluate student performance and the levels of student achievement of each criterion.

65. Being "clear and explicit" with regard to learning objectives and assessment criteria are a best practice articulated for experiential exercises. STUCKEY ET AL., *supra* note 1, at 168.

66. *Infra* Appendix 7, at 83–85.



exercise, eliminate redundant or time inefficient components, and tailor the supporting resources to the needs of my students.

Additionally, students assess the quantity and quality of work performed by their assigned opposing counsel. Students also assess their own performance, specifically identifying their strengths and weaknesses in the skills required to complete the assignment.<sup>67</sup> In most instances the feedback from team members is consistent with one another, and they view both the division and quality of work similarly. In the event that teammates have dramatically different views of the division and quality of the work or both, I meet with the team members individually and will consider assigning individual grades based on the information learned in those meetings.<sup>68</sup> Peer- and self-assessment questions from the evaluations are excerpted below.

**Opposing Counsel Assessment & Self Reflection Questions:**

1. Please state the percentage of overall work contributed by your *opposing counsel*. Provide a description of how the work was divided in your team.
2. Please provide comments evaluating the performance and professionalism of your *opposing counsel* (availability, prepared for negotiations, assistance in thinking through solutions, assistance in drafting final work product . . . etc.).
3. Please describe your performance and professionalism in this assignment. Additionally, please state what you

---

67. See Brooks, *supra* note 42, at 421

In addition to teaching students how to collaborate with others, group feedback, when done well, can assist individuals in looking inward and gaining deeper and more meaningful appreciation of their own feelings and emotions, as is contemplated by the interpersonal and affective competency area within the relational framework. William Torbert, a pioneer in the field of experiential learning, views feedback as perhaps best effectuated in group settings, where the learner can benefit from self analysis along with her analysis of fellow group members, rather than solely from an expert's analysis.

68. See *id.* at 420 (“[S]imulated practice can provide significant opportunities for students’ self-reflection on their inter- and intrapersonal competencies . . . such as team building and collaboration, important aspects of professionalism that can potentially be encouraged through group work in all its dimensions.”).

believe was your strength on the team, and your weakness.

4. Based on the above, please assign your *opposing counsel* a grade for her/his role and participation in the assignment, using a letter grade scale.

\* \* \*

7. Please identify the part of the assignment that you
  - a. felt the most comfortable tackling.
  - b. felt the least comfortable tackling.

The materials for this exercise were designed to achieve the learning outcomes discussed above and were substantially tailored by student feedback. These materials are intended to be applicable to almost any transactional course and elements of the problem-design like co-counsel groups, issue grids, and assessment forms are transferable to most law school courses in and outside of the business context.

#### *IV. Facilitating Transactional Skill Acquisition Through Experiential Exercises*

Providing students with an opportunity to learn LLC principles in the context of experiential exercises facilitates students' mastery of doctrinal concepts, acquisition of transactional skills, and development of professional identities.<sup>69</sup> LLC experiential exercises are efficient vehicles for students to gain hands-on experience with professionalism, client counseling, negotiation, and drafting.<sup>70</sup> Additionally, students practice analyzing issues from both legal and business perspectives.

---

69. See Okamoto, *supra* note 51, at 71 ("Law schools are giving more and more attention to this question of how to prepare students to become transactional lawyers . . . . [L]aw school curricula at every level of law school are being pushed to include a new focus on teaching future practitioners how to do deals.").

70. See Maranville, *supra* note 21, at 58

[F]amiliarity with the people and factual circumstances, the social institutions, and the legal processes within which legal doctrine arises—can be provided to some extent didactically, by means of course materials, explanations by the teacher, or drawing on the experience of the class. But experiential learning can bring these contexts to life.

### A. Professionalism

Client-based problems allow students to practice the role of lawyering and to assume the identity of a professional in the field.<sup>71</sup> Formation of one's professional identity means "the growth of each student's internalized moral core including deep responsibility to others, particularly the client, with some restraint on self-interest; a standard of excellence for technical skills; integrity; honesty; public service (particularly for the disadvantaged); and independent judgment and honest counsel."<sup>72</sup>

In the exercises discussed in this Article, students practice their professionalism in three settings: (1) representing clients' interests, (2) working collaboratively with a team of lawyers, and (3) working with opposing counsel for a mutually satisfactory final agreement. In each of these settings, students practice a different component of professionalism required in law practice.<sup>73</sup>

Client representation in experiential exercises is the most obvious application for professionalism development, and is consistent with other opportunities such as live-client clinics in law schools. Assigning students to represent a client and providing students with confidential information regarding the client's position, desired outcomes, and context for the transactions allows students to advocate for positive client outcomes in the negotiation and drafting stages of the

---

71. See David I.C. Thomson, *Teaching' Formation of Professional Identity 1* (Univ. of Denver Legal Studies Working Paper No. 12-45, 2012), available at <http://ssrn.com/abstract=2171321>. The problem is that formation of an identity is not something we can "teach" per se, since you cannot teach someone to form his or her identity. Rather, we as teachers need to create "situations" in which our students can be confronted with ethical questions and reflect on the decisions they make, and be guided by us as they form their own professional identities.

72. Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 374 (2011).

73. See generally Charlotte S. Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*, 70 MD. L. REV. 465 (2011) (discussing the need for law school curriculum to provide students with opportunities to develop professional identities and methods to achieve this goal).

assignment.<sup>74</sup> Students work to comprehend and identify with client goals in client simulation exercises.<sup>75</sup>

Additionally, LLCs, like many small businesses, present ethical questions for students regarding who is the client. Do students represent the LLC as a whole or the individual owners or managers of the entity?<sup>76</sup> Joint representation of multiple owners of the same business is another important ethical lesson that can be incorporated into LLC-based client simulations.<sup>77</sup> These problems present an opportunity for students to understand the ways in which the interests of co-owners, while often aligned, can be in conflict with one another now or in the future and thus require an express waiver of that conflict and careful consideration by the attorney and the parties as to whether joint representation presents the best approach.

In the LLC-based experiential exercises described in this paper, students have an opportunity to work in collaborative settings within their assigned co-counsel groups. In the co-counsel groups, students discuss the problem, identify client objectives, identify and prioritize issues within the proposed transaction, prepare for opposing counsel negotiations, and

---

74. For many students, well-thought-out simulation exercises seem to be sufficient to provide the level of context needed to increase engagement, but at least a few students will not be engaged at all by simulations. Even for those who are engaged by simulations, real cases will provide more vivid and engaging context than will simulated exercises. For me, the bottom line is that using simulations is better than including no experiential learning opportunities, but the ideal is to include as much real experience as possible. See Maranville, *supra* note 21, at 68.

75. See Kunz, *supra* note 40, at 334 (describing “getting to know your client by finding out his or her goals, needs, and expectations” and understanding your client’s business as fundamental transactional skills).

76. See, e.g., MODEL CODE OF PROF’L CONDUCT R. 1.13 (2002) (addressing professional conduct when the client is an organization); NEUMANN, JR., *supra* note 47, at 103–07 (describing professional conduct with clients).

77. See MODEL CODE OF PROF’L CONDUCT R. 1.7(a)(1) (2002) (addressing professional conduct regarding conflicts of interest). “The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, in its Opinion 2001-2 (April 2001) discusses the issue in considerably more detail, but it concludes that whether the lawyer can proceed depends on the circumstances.” AN ETHICS PRIMER FOR TRANSACTIONAL LAWYERS, RSTJ33 ALI-ABA 15, 22; see also *id.* at 20 (describing the tension in representing more than one client in a transaction and the need for a waiver of joint representation); *infra* Appendix 1 (describing an assignment touching on joint representation).

brainstorm drafting solutions and creative approaches.<sup>78</sup> Working in co-counsel groups breaks the habit of isolated work done in silos and models the collaborative, team approach used in many professional settings.<sup>79</sup>

Negotiations and joint drafting with assigned opposing counsel requires students to assume a professional identity in advocacy, communication, and collegiality. In negotiating students balance positional bargaining with problem-solving techniques providing an opportunity to learn when to advocate, when to compromise, and when to seek alternatives.<sup>80</sup> The joint work product produced by each team of student attorneys is graded, informed in part by student evaluations of the division and quality of work performed by opposing counsel. Injecting peer evaluations into the exercises emphasizes the importance of soft professionalism skills such as timeliness of responses, thoroughness in drafting and editing, and quality of communication regarding schedules, expectations, and action items.<sup>81</sup> Just like in practice, reputation regarding conduct,

---

78. The work of the co-counsel groups models collaborative learning groups where a class is broken into working groups to complete a task. See Erickson, *supra* note 17, at 103.

79. A particular criticism I increasingly hear from practicing lawyers is that students graduate from law school not knowing how to work effectively in teams or how to “play well with others.” With limited—albeit notable—exceptions, law schools place little value in and tend to devote minimal class time to cultivating students’ ability to work collaboratively with other students. See Brooks, *supra* note 42, at 420 (discussing the lack of relationship-centered experiential curriculum in law schools); Roark M. Reed, *Group Learning in Law School*, 34 J. LEGAL EDUC. 674, 682–84 (1984) (explaining the advantages of integrating group work into law school curricula).

80. “When negotiators bargain over positions they tend to lock themselves in those positions . . . As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties . . . Bargaining over positions creates incentives that stall settlements . . . Positional bargaining becomes a contest of will.” ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATION AGREEMENT WITHOUT GIVING IN* 4–5 (1st ed. 1981); Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. BALT. INTELL. PROP. L.J. 47, 57 (2000) (discussing positional bargaining).

81. There are three articulated objectives for simulated practice: (1) “to help a student begin to develop the ‘capacity to recognize personal and professional strengths and weaknesses, to identify the limits of personal knowledge and skill and to develop strategies that will enhance professional performance;” (2) “to develop a student’s ‘ability to recognize and resolve ethical dilemmas’ and ‘employ risk management skills;” and (3) “to provide students—at least in part—with ‘a practical understanding of and commitment to’

collegiality, and work ethic matter and form the context in which the final work product is produced and evaluated.

### *B. Negotiation*

Experiential LLC exercises provide students with an opportunity to learn about and apply negotiation techniques. As mentioned above, students must expand their negotiation tools to include problem solving negotiation techniques. Negotiating a single point, such as the price of a car in a one-time transaction can lend itself to positional bargaining. In positional bargaining, the two parties state their desired price with the final price reflecting a combination of compromise (meeting in the middle) and relative bargaining or hold out power of the parties.<sup>82</sup> In a business planning exercise involving an LLC client, the transaction marks the beginning of an ongoing relationship between the parties and often presents multiple, overlapping and intertwined issues that require problem-solving-based negotiations. In the LLC LOI, students juggle and balance their client's interests and objectives with the interests and objectives of the opposing party on several different topics. The future relationship and multiplicity of issues force students outside of a positional bargaining approach.

Students are supported in the process of preparing to negotiate legal and business issues with opposing counsel through the co-counsel groups and mini-assignments that build up to the final work product. For example, students complete an issue-identification grid where they state their client's ideal position and their minimum/maximum position for the contemplated LLC operating agreement regarding ownership interest percentages, management structure, fiduciary duties, and financial rights.<sup>83</sup> Students also discuss employment issues,

---

professionalism, meaning 'the values, behaviors, attitudes, and ethical requirements of a lawyer.'" Brooks, *supra* note 42, at 419 (quoting Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Programs*, 13 CLINICAL L. REV. 807, 827 (2007)).

82. See FISHER & URY, *supra* note 80, at 4-5 (providing an overview of positional bargaining).

83. For a discussion on the value of transactional work providing a foundation to teach ex ante thinking, see Todres, *supra* note 24, at 376. The

confidentiality, exclusivity of negotiations, closing conditions, and financing obligations.

Students think through each issue individually and then discuss the issues collectively with co-counsel to ensure that their list is comprehensive.<sup>84</sup> The co-counsel groups are an invaluable component of experiential exercises because they provide a smoothing effect over the different knowledge bases and business experiences of students.<sup>85</sup> By assigning students to same-client working groups, students share their expertise, ideas, and experiences with one another, which builds students' confidence and preparedness for negotiations and helps level the playing field among students. Feedback on the value of co-counsel meetings reflects this smoothing effect with approximately half of the students valuing the early meetings and half valuing most highly the meetings at the end of the assignment. Those who valued the early meetings were more familiar with the business context and concepts and used the early meetings to distill the materials and organize a framework for completing the assignment. The other half of the students, those who tended to have less business experience, reported feeling overwhelmed at the beginning of the assignment and also reported a more passive role in co-counsel meetings. Those who valued early meetings discounted later meetings as not as helpful or productive, but the reluctant participants early on valued the later meetings where they had essentially caught up and could participate with their peers.

---

challenge for students is to develop the ability to analyze and anticipate possible outcomes, come up with ideas for how to account for all possible contingencies, and put all of this in writing (ideally in such a way as to enable clients to avoid litigation in the future).

84. See Erickson, *supra* note 17, at 102 (describing the "think-pair-share" approach to experiential exercises which ask "students to think about a problem for a short amount of time on their own . . . then discuss the problem and compare their answer").

85. See, e.g., East, *supra* note 28, at 233 (discussing the different experience level of students in transactional-focused classes). One of our goals is to get a group of students who have different experiences to a common level of experience and comfort. For some students, their main business experience before beginning the Deal Skills course is in taking the Contract Drafting course, whereas other students may have actually run their own businesses. We often have some students who are in the joint J.D. and M.B.A. programs.

Opposing counsel negotiations require students to be knowledgeable about both the business and the legal issues from their client's perspective.<sup>86</sup> The issue-identification grids assist students in identifying individual issues as well as analyzing the transaction as a whole. To approach negotiations, students identify the issues to be negotiated and then prioritize them to create a framework for negotiations.<sup>87</sup> Class discussion and readings support these exercises by explaining different components of and approaches to negotiations. For example, discussions about framing requests in terms of interests, justifying concessions, and resolving points of dispute provide students with the tools to approach negotiations in a productive manner.<sup>88</sup>

### *C. Drafting*

Legal drafting requires both technical and substantive skills. To draft a binding contract, students employ the right language in the correct format. But they must also do more. Students articulate the deal points agreed to by the parties in a manner that can withstand a potentially hostile review by third parties not currently at the deal table, like a judge. The skills transferred to students in LLC drafting exercises are applicable in both transactional and litigation practices because understanding how to write contracts is necessary to understanding how to read contracts. Additionally, drafting exercises convey to students an understanding of how final agreements operate (for example, the role of representations and warranties) and the process by which they are created. These context-driven lessons are nearly impossible to convey in a compelling way that students retain by lecture alone. Experiential exercises provide a powerful vehicle to transfer this knowledge to students.

---

86. *Id.* at 223 ("One thing we should teach more is presentation skills. By that I mean small-scale communication.").

87. *Id.* at 236 (describing a transactional exercise in which students present to a supervising attorney the "three most important facts or issues" for a negotiation).

88. See NEUMANN, JR., *supra* note 47, at 21–26, 103–12 (describing basic skills of negotiation).



Legal education is disproportionately focused on litigation and litigation skills, from casebooks, to class discussions, to clinic work, and extracurricular activities like moot court and even law review editing.<sup>89</sup> Preparing students with drafting skills through transactional exercises serves the mandate for law schools to produce practice-ready graduates. “Drafting is an essential skill in the transactional world (and also needed in settlement negotiations and other aspects of a litigation practice).”<sup>90</sup> Drafting exercises explicate the principles of first year contracts illustrating the difference between conditions, covenants, and discretionary authority.<sup>91</sup> Drafting exercises also teach students the importance of specificity, precision, and consistency in writing—valuable lessons in all practice areas.<sup>92</sup>

Incorporating drafting assignments into business entity courses breathes life into the default rules that shape the standard rights and obligations of owners. Put into the context of a client-based problem, students can see how the default rules shape the rights of owners and when those preset balancing

---

89. Exposure to law-in-action is particularly beneficial in fields where much of the practice is planning-focused rather than litigation-focused. Much of law school is taught in the context of litigation, looking at situations after they occur. Legal research and writing classes overwhelmingly focus students’ attention on litigation. Students study cases that discuss the legal consequences of past events, and even with problem-method instruction, students are often asked to evaluate the legal consequences of a given set of facts that already occurred. See Field, *supra* note 23, at 55 (“Exposure to law-in-action is particularly beneficial in fields where much of the practice is planning-focused rather than litigation-focused.”); Tina L. Stark, *Transactional Education: What’s Next? Welcome & Opening Remarks*, 12 TRANSACTIONS: TENN. J. BUS. L. 3 (2011) (“The MacCrate and Carnegie Reports gave transactional education short shrift, not recognizing that the skills we use differ from those used in litigation and that therefore our pedagogy differs. Moreover, it seems that *U.S. News & World Report* does not know we exist.”).

90. Todres, *supra* note 24, at 377.

91. See generally Kunz, *supra* note 40, at 336 (discussing how transactional exercises explicate first year course concepts in contracts and property, for example).

92. See generally Stark, *supra* note 89, at 4 (describing how a law professor “uses the legal writing construct IRAC to teach her students how to draft sophisticated contract provisions in corporate finance agreements”); see also Todres, *supra* note 24, at 377 (“[D]rafting exercises enable students to improve their writing skills. Second, drafting exercises convey to students the complexities involved in taking an idea and translating it to a written document.”).

points should be changed to better serve the interests of clients. In experiential exercises students practice tailoring default rules. For example, in the exercise described in this Article, students tailor default fiduciary duties to allow for the two companies forming the LLC to continue to operate and expand their existing business lines without competing with the newly formed LLC. Students can accomplish this goal by waiving certain components of the duty of loyalty by carving out competition actions that would not violate the fiduciary duty.<sup>93</sup> Similarly, how students resolve open issues regarding the management structure, financial rights and voting rights of the members may also require tailoring the default LLC rules.

Requiring a final work product in the form of negotiated and drafted contract language forces students to marry substantive knowledge of LLC default rules with transactional skills regarding contract construction, norms, and language.

#### *D. Counseling*

Transactional practice, particularly one that includes advising small businesses like LLCs, requires attorneys to have counseling skills. Counseling skills can mean many different things in legal practice, and in transactional settings they are focused particularly on helping clients identify and articulate their interests and concerns regarding a transaction, analyze options, and agree upon a particular balancing of rights, interests and obligations in any deal.<sup>94</sup> Students practice these skills by identifying client objectives and concerns in co-counsel group settings and prioritizing client issues in preparation for negotiation with opposing counsel. In the absence of a live client, the co-counsel groups act as a good substitute.<sup>95</sup> Students discuss

---

93. See generally Sandra K. Miller, *What Fiduciary Duties Should Apply to the LLC Manager After More than a Decade of Experimentation?*, 32 J. CORP. L. 565, 573 (2007) (discussing statutory approaches for fiduciary duties in unincorporate entities and the various contracting solutions and legal challenges that result).

94. See NEUMANN, JR., *supra* note 47, at 21–26 (discussing counseling skills in transactional practice).

95. See Maranville, *supra* note 21, at, 68 (discussing the merits of simulation problems versus live client problems).

issues with students assigned to represent the same client. In order to convince peers of a certain perspective or point, students practice many of the same counseling and communication skills as required with a client. Additionally, supporting assignments leading up to the final work product, such as the issue grid model how practicing attorneys organize deal issues for purposes of fact gathering from clients, reporting negotiation progress and counseling clients to see the benefit of concessions and accomplishments in negotiations.

Experiential exercises also provide a context to discuss professional rules of conduct regarding client counseling such as obligations to provide candid advice,<sup>96</sup> thorough explanations necessary for clients to make informed decisions,<sup>97</sup> and the legal and moral limits of advocacy and representation.<sup>98</sup> For example, these obligations are illustrated with class discussion of the issue grid and how it can be used to describe the negotiation progress and concessions to clients. Discussion of lawyers' ethical boundaries and obligations with regard to a specific client problem contextualizes the ethical rules and deepens students' ability to comprehend and apply the stated rules by making the hypothetical seem more tangible.<sup>99</sup>

---

96. See MODEL CODE OF PROF'L CONDUCT R. 2.1 (2002) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); NEUMANN, JR., *supra* note 47, at 79–81 (outlining lawyer-client duties); AN ETHICS PRIMER, *supra* note 77, at 15, 28 (describing negotiation ethics).

97. See MODEL CODE OF PROF'L CONDUCT R. 1.4 (2002) (requiring an attorney to keep a client reasonably informed about decisions, status, to consult and to comply with requests for information); NEUMANN, JR., *supra* note 47, at 79–81 (outlining lawyer-client duties).

98. See MODEL CODE OF PROF'L CONDUCT R. 1.2 (2002) (describing the scope of representation); NEUMANN, JR., *supra* note 47, at 79–81 (further outlining lawyer-client duties).

99. See Anne Colby & William M. Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 U. ST. THOMAS L.J. 404, 408 (2008) (describing the need to contextualize the presentation of ethical dilemmas in a profession to prepare graduates for the circumstances in which they will practice); Hamilton & Monson, *supra* note 72, at 392–93 ("[C]onstruivist pedagogies are pervasive throughout professional education and adult education because learning that is contextualized (i.e., resembling practice settings) more readily transfers to other settings. Examples in professional education include simulations, role-plays, or clinics.").

*E. Issue Analysis, Business Perspectives and Financial Literacy*

Experiential exercises built around LLC clients require students to analyze the clients' needs from both a legal and a business perspective. Legal obligations, outcomes, and advice have a context. Incorporating business perspectives through client-based problems injects the legal analysis with the complexities and constraints of corresponding business needs. Experiential exercises remove the study of business entities from the vacuum and sterile environment of classroom lecture alone.<sup>100</sup>

Experiential exercises also provide professors with the opportunity to include financial data in the problem facts. I teach basic balance sheet financial literacy<sup>101</sup> in UBA to give students the tools needed to view financial statements as evidence and research as we would encourage students to similarly view case law. Our graduates should not first view financial statements in practice, but should be given the opportunity to learn how to read and use the information contained in financial statements in the guided environment of the classroom.<sup>102</sup> Ability to read and understand balance sheets and basic financial statements is particularly important with pass-through taxation entities like LLCs, partnerships and other hybrid business forms.<sup>103</sup> Financial

---

100. See Carl J. Circo, *An Educational Partnership Model for Establishing, Structuring, and Implementing a Successful Corporate Counsel Externship*, 17 CLINICAL L. REV. 99, 102–03 (2010) (discussing the benefits of actual practice experience). Many lawyers regularly represent business clients or handle transactions and disputes in which business organizations are involved. Indeed, a significant number of lawyers devote their careers exclusively or primarily to serving business clients or are otherwise employed primarily in business contexts. Students can best develop some of the knowledge and skills they will need to succeed as commercial and business lawyers through experiential learning opportunities that occur in a business context.

101. Balance sheet financial literacy is not a term of art but how I refer to basic instructions regarding the elements of and information contained in balance sheets, income statements, and cash flow statements. The information conveyed and the materials used in my course are not to be confused with the in-depth financial and accounting materials covered in courses such as Accounting for Lawyers offered at many law schools. See generally MATTHEW J. BARRETT & DAVID RICHARD HERWITZ, ACCOUNTING FOR LAWYERS (4th ed. 2006).

102. See STUCKEY ET AL., *supra* note 1, at 182 (noting that initial exposure to new concepts and skills allows students to experience “first-level errors”).

103. See, e.g., RIBSTEIN & LIPSHAW, *supra* note 55, at 445 (describing the role of capital accounts in LLCs to understand LLC members' financial interests in the LLC and the interplay of tax considerations).

data is not included in the problem materials described later in this paper, but is included in later assignments in my UBA class.<sup>104</sup>

Blended courses that combine traditional doctrinal course work with experiential exercises encourage students to learn the law in a contextualized setting. Experiential exercises require students to simultaneously develop legal analysis, professionalism, counseling, negotiation, drafting, and financial literacy skills.

#### *V. Modifications and Suggestions for Incorporation*

Creating a successful blended course where experiential exercises are employed to teach the traditional doctrinal course materials depends upon many different factors such as existing curriculum, administrative support, a professor's experience and comfort with creating experiential exercises, and time to facilitate and assess students' work products. Understanding that not all classes can be or should be blended, the following describes how to tailor the LLC LOI for survey courses, upper-level courses, and other modifications. LLCs, as the chameleon entity, are well-suited to serve as the backdrop for these exercises because the legal issues embedded in LLC planning can be expanded or restricted as described in this Article and its supporting components. LLCs may be owned by a single member, and thus the exercise can focus more on drafting components. LLCs can also have many owners and different management styles that either mirror partnerships (member-managed with default equal votes and fiduciary duties for all members) or corporations (manager-managed with different votes and duties for members) requiring students to tailor the default rules in a final agreement. The iterations and variations of the LLC LOI exercise are

---

104. I provide students with balance sheets and annual profit-loss statements for a family-owned business whose owners are interested in entering into a buy-out agreement. The financial data provided to the students establish the ownership interests, show any loans made by owners to the LLC, illustrate liquidity issues with exit, and provide the basis for various buy-out price calculations.

virtually limitless; however, specific examples are provided below.

### *A. Survey Course*

In a larger survey course, like Business Associations or Corporations, the fact that some experiential exercises require repeated and intensive professor-provided feedback on student work is a serious obstacle to implementation. Additionally, the logistics of creating teams and having working space for the different groups is problematic with large enrollment classes. Finally, the amount of material to cover in a traditional survey course precludes the ability to spend five weeks on an LLC-focused assignment. These limitations require restricting the exercise described in this paper into something manageable in terms of time and scope.

#### *1. Stand Alone Assignments*

First, the component assignments may be modified to become a stand-alone assignment to compliment course content. For example, students could be provided with a scaled down client packet containing information regarding the proposed transaction. Students would be assigned a client to represent and the final work product could be a individual or team-based issue identification grid, as illustrated in Appendix 4, or written responses to the question sets included in Appendix 5. Here the focus shifts to mastering the doctrinal concepts in an applied business setting and away from the transactional skills of negotiation and drafting. Students would still gain valuable exposure to and experience with preparing for negotiation, identifying legal and business issues, and possibly collaborating if the assignment was completed in teams.

#### *2. Limited-Scope Drafting Exercises*

Second, the students could be given a completed LOI that described the LLC to be formed by the two clients. Students could

be asked to draft a single provision of the Operating Agreement for the new company based on the LOI, focusing perhaps on management structure of the LLC, fiduciary duties, or financial rights. This iteration emphasizes both substantive law and the transactional skill of drafting. Alternatively, students could be assigned a client to represent and opposing counsel in order to negotiate and draft one provision in the final Operating Agreement. Drafting in teams combines substantive law with transactional skills such as negotiation, drafting, and professionalism. By limiting the scope of the assignment and the length of the final work product, the exercise could be incorporated into a survey course. Additionally, incorporating self and peer assessments into the exercises may reduce professor time investment while still providing sufficient formative feedback to achieve learning objectives.<sup>105</sup> Assessments could allow for students to mark drafted provisions (their own or a peer's) using a grading guide developed and distributed by the professor.

### *B. Upper-Level Course*

The LLC LOI experiential exercise could also be expanded to be more appropriate for an upper-level course, capstone, or seminar by deepening the issues presented in this exercise and expanding the scope of the final work product.

#### *1. Deepening the Financial Issues*

Incorporating additional financial data into the Client Packet and additional financial issues in the Research File provides a platform for students to negotiate additional issues such as the purchase price for the restaurant assets, the contribution-ownership percentages of the parties, the financing arrangements of the purchasing client, and the tax consequences of the transactions.

---

105. See, e.g., Erickson, *supra* note 17, at 100–03 (describing assessment approaches and providing an example of peer and self-assessments models that facilitate manageable review in a ninety-student course).

### *2. Incorporating a Due Diligence Simulation*

The exercise could also lend itself to a simulation of the due diligence process where the students could be asked to think through the documents necessary for review in due diligence. Alternatively students could be given a prepared due diligence file to confirm the facts underlying the transactions such as the correct formation of the parties, the authority to enter into the transaction by terms of Operating Agreement and vote, title to the assets being purchased, the financial solvency of the two LLCs, the financial stability of the restaurant being purchased, and other elements of due diligence such as lease agreements, insurance contracts, and loans. Final work products turned in for a grade could include a due diligence memo or schedules to the Asset Purchase Agreement.

### *3. Expanding the Written Work Product*

The LLC exercise could also be expanded by requiring additional written work product from students. For example, students could be asked to negotiate and draft corollary agreements contemplated in the LOI such as an employment agreement for the restaurant manager, noncompete agreements for the parties, and confidentiality agreements. The assignment could also be expanded so that the LOI was not the final work product but that students were also asked to negotiate and draft the final Operating Agreement and Asset Purchase Agreement. Expanding the exercise to include these additional work products reinforces opportunities for students to acquire issue identification, negotiation, drafting, counseling, and professionalism skills. Additional written work product increases students' opportunity for feedback. It also increases professors' time in assessing student work but would not require additional problem sets to be created or additional class time to be devoted to setting up another transaction. Supporting materials such as an annotated form Operating Agreement and annotated Asset Purchase Agreement would facilitate students' completion of the additional drafting assignments.



#### *4. Emphasizing Lawyering Skills*

The exercise can also be adapted to emphasize lawyering skills with mock client interviews or counseling sessions. Students could practice interviewing and counseling skills if someone played the role of the controlling owner of the LLC. Alternatively, additional assignment components could be constructed so that students prepared questions for a client interview in order to obtain additional information to complete the assignment. To conclude the exercise, the professor should compile supplemental client fact sheets in responses to the question and distribute them to students.

#### *C. Hybrid Entities*

The transaction contemplated in the LLC LOI is that two businesses want to form a new business to acquire and operate an existing business. In the current problem set all of the businesses, existing and to be formed, are LLCs. The transaction can be amended to include other entities such as partnerships, limited partnerships, and corporations, so that one transaction could be the backdrop to discuss the default rules of partnerships, LLCs, corporations, or any other entity. For example, Client A would be a partnership and Client B would be a corporation. The new business entity to be formed would be an LLC and the business assets to be acquired would be purchased from a limited partnership. Examining the transactions with these various business entities facilitates a discussion of the default rules and provides an excellent vehicle to compare and contrast the different business entity forms.

#### *VI. Reflections & Conclusions*

Developing, implementing, and adapting experiential exercises in my UBA course has been a fulfilling experience for me and an engaging one for my students. The time invested in preparing the materials and facilitating the simulations in class has been a well-placed investment. Class is more enjoyable to teach, and my students report deriving value and enjoyment from

the applied approach. For me, this experiment in experiential exercises underscores the false dichotomy of teaching doctrine *or* teaching skills. My intention with this Article is to highlight how experiential exercises provide an efficient vehicle to teach doctrinal law, particularly in the field of LLCs, and to provide supporting materials and implementation suggestions for those interested in incorporating this approach in their own courses.

*Appendix 1: Client Packets Excerpts***Letter of Intent (LOI) Assignment**

For your second drafting assignment, you will represent either Gud Fude Restaurants LLC (Client A) or Intown Foodies Collective, LLC (Client B). Clients A & B have reached an initial agreement to form a new LLC, which will purchase a restaurant group currently being operated by Client B. Your tasks in this assignment include negotiating some of the deal points to be included in the new LLC's Operating Agreement and as well as some of the deal points of the asset purchase agreement to purchase the restaurant. Your final work product will be a fully negotiated and drafted Letter of Intent (LOI) between Clients A & B for the new LLC Operating Agreement and the Asset Purchase Agreement.

**Negotiation & Drafting:** You will collaborate with your assigned co-counsel groups. You will negotiate and draft the terms of the final LOI with your assigned opposing counsel on the final work product. For this assignment you will receive common information regarding the assignment, confidential client information specific to your client, and a research file. While you may always conduct additional research, you are not expected to do so; the materials provided combined with classroom support are intended to meet fully your comprehension and drafting needs.

**Grading:** Each team will receive the same grade on the final LOI, with minor modifications made, if necessary, in light of the partner evaluations completed after the assignment. The complete drafting assignment will be worth approximately 30 points; total points for all drafting assignments comprise 35% of your final grade in this class.

**Assignment Dates:**

- **CLASS 8**
  - **Problem released**
  - **Co-Counsel & Opposing Counsel Introductions**

- Initial group questions assigned
  - Lecture on LLC & LOI's
- **CLASS 9**
  - Lecture on LLC's & Drafting Lecture
  - Co-Counsel Group Meeting—review second set of questions
  - Opposing Counsel Meeting—prepare for initial draft
- **5:00 pm TURN IN DATE: October 27, 2013**
  - Turn in first page of LOI (see packet and TWEN worksheet)
- **CLASS 10**
  - LLC Lecture & Drafting Lecture
  - Turn in Individual Negotiation Grid
  - Co-Counsel Meeting & Opposing counsel negotiation (50 minutes)
- **CLASS 11**
  - Final Team Questions & opposing counsel meetings
- **TURN IN FINAL LOI November 8, 2013 by 5:00 pm**
- **CLASS 12—discussion of LOI assignment & evaluations**

### **GENERAL INFORMATION FOR BOTH PARTIES**

It is October 2013. Gud Fude Restaurants, LLC (GFR) has been successfully operating several popular restaurants in Atlanta for 10 years. Despite the economic slump, the group's brand has remained strong, with each restaurant continuing to draw large crowds every week. GFR's restaurants make the "best of" lists in Atlanta every year and are leaders in the Atlanta food scene. Because of its success, the four founders of GFR, each of whom remains an integral part of the business, have been discussing the possibility of expansion.

John Cameron, the President of GFR, has been in touch with an old friend of his from Georgia State, Matt Sheridan. A well-known Atlanta restaurateur, Matt has made a name for himself with incredibly popular restaurants that feature locally sourced, seasonal ingredients that marry the best of sustainability with

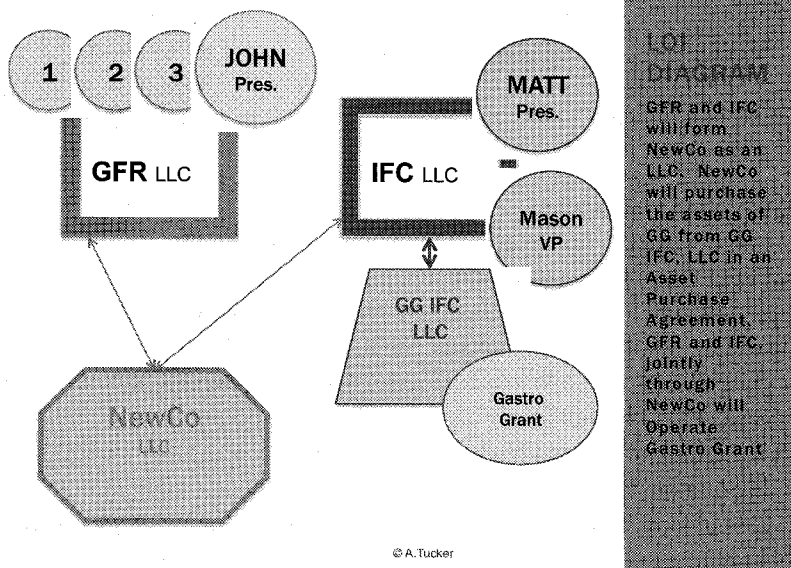
creativity. He operates all of these restaurants through his entity Intown Foodies Collective, LLC, a Georgia limited liability company (IFC), of which he and his brother, Mason Sheridan, are the sole members. Matt is the President of IFC, and Mason is the Vice President.

John had heard that Matt and Mason were thinking about looking for investors to form a new company to spin off one of their smaller ventures, a tiny gastro pub in Grant Park doing business as Gastro Grant (GG). GG is a separately incorporated Georgia limited liability company, formed under the name Gastro Grant IFC, LLC (GG IFC) that is 100% owned by IFC. John contacted Matt about the possibility of GFR purchasing GG or obtaining a controlling interest in GG IFC. John thought the gastro pub would nicely compliment three of GFR's other enterprises—one is a microbrewery and the other two are small taverns that serve interesting beers and an assortment of pub-like food.

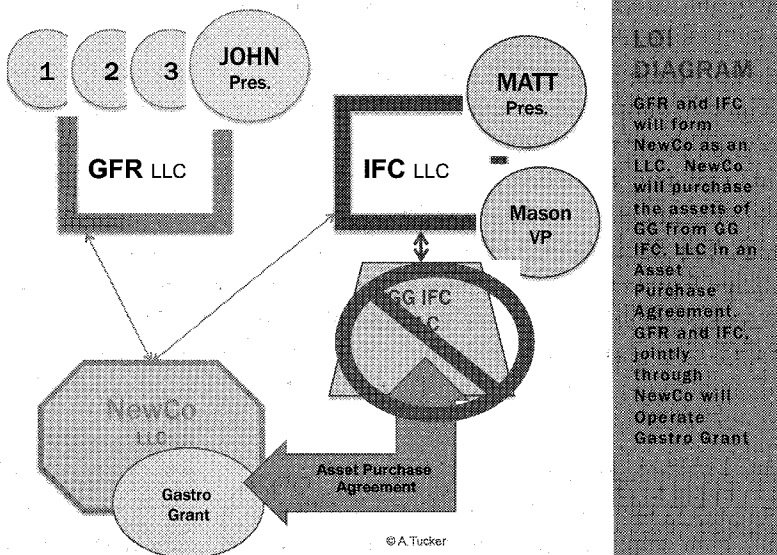
Matt has found that he does not have a lot of passion for the gastro pub model, and that it is hard to carry out the sustainability and local ingredients branding of their restaurants in strictly pub fare. Because of this, he has found that, more and more, he is failing to take the “hands on” approach that he usually takes with his endeavors and is worried that business will suffer. If any of his enterprises suffer, he is worried this would have a negative effect on the brand's image and ultimately on the business of IFC's other restaurants. However, like all of his enterprises, Matt thinks of GG as one of his “babies” and has a great fondness for the restaurant. As such, letting John, an old friend, obtain a controlling interest in GG is much more appealing than selling to a stranger. To enter into business with John and his company, GFR, represents a departure from the business model and branding which has been so successful for IFC. As such, Matt has proposed that IFC and GFR form a new company (NewCo), which will be formed as an LLC, in order to purchase the tangible assets (lease/land, equipment, etc.) and intangible assets (trademark and IP on GG, recipes, employees, good will, etc.) of GG IFC from IFC.

IFC and GFR have already engaged in some preliminary

negotiations. Instead of conducting a traditional unit purchase agreement where John/GFR would purchase an interest in the existing company, GG IFC, the two friends have decided to form a new spin off company, NewCo, which will own and operate GG and possibly open additional franchise locations throughout Georgia and the Southeast. IFC has agreed to sell the assets of GG IFC (including the trademarks, inventory, lease rights, etc.) to NewCo for \$1,000,000.<sup>106</sup> The parties will need to negotiate an Operating Agreement for NewCo, to be created by John and Matt's companies as well as memorialize some key terms of the sale of GG IFC's assets to NewCo.



106. Note the purchase price of the assets of Gastro Grant IFC from IFC is not an item to be negotiated in this exercise. The task at hand is to negotiate the key issues within the Operating Agreement of NewCo and key terms of the Asset Purchase Agreement between GG IFC and NewCo. In the sample LOI that you are to use for this assignment, a provision has already been drafted reflecting the purchase price and the terms of adjustments. This provision does not need to be further negotiated or edited.



### Drafting Instructions:

Each team must convert the form Letter of Intent to be appropriate for the negotiated deal. In addition to completing the “fill-in-the-blank” drafting details, each team will need to address the following substantive issues within their LOI:

- Negotiate the ownership interest percentage IFC and GFR will own respectively in NewCo.
- Employment contract issues
- Non-compete issues
- Decide on the management of NewCo (member or manager-managed) and how to Govern NewCo? The operation of Gastro Grant?
- Fiduciary duties of members (managers/members) in NewCo, including rights to compete
- Compensation rights (default rules or modified) for profits of NewCo
- Exclusivity rights in negotiating the LOI/final agreements
- Closing conditions for the final agreements
- Confidentiality of negotiations

Please also consider the optional and additional provisions provided in the LOI and tailor them as needed to reflect the agreement reached by the parties. The LOI form as well as a sample LOI and a sample Operating Agreement are available on TWEN.

**In negotiations during Class 9**, you and your ***Opposing Counsel*** will discuss and draft language for the first 5 items on the LOI (available on TWEN). Please email one copy of the initial draft, with your opposing counsel CC'ed and the title of the email and document (LAST NAME of counsel for Client A/LAST NAME of counsel for Client B) by **5:00 pm on Sunday, October 27th**.

*[example omitted]*

**For Class 10**, prepare an issue grid like the one listed below (available on TWEN). Please turn in one copy at the beginning of Class 10. Please keep one copy for yourself to assist you in negotiations with opposing counsel. Note, the grid that you turn in for Class 10 will not reflect the counterpoints or final decision of the parties—that will be completed during/after negotiations with opposing counsel, and incorporated into the final letter of intent.

*[example omitted]*

### **Confidential Instructions to Counsel for IFC—Client B**

NOTE: During negotiations you may reveal some of this information to your opposing counsel; however, you are not allowed to show opposing counsel these Confidential Instructions.

Matt and Mason Sheridan are the sole members of Intown Foodies Collective, LLC (IFC). IFC is the sole member of Gastro Grant IFC LLC (GG IFC) which owns and operates a gastro pub in Grant Park doing business as Gastro Grant (GG). IFC has agreed to transfer the assets held by GG IFC, including its inventory, lease hold rights, trademarks, etc. in GG to a new company (NewCo) to be formed between IFC and Gud Fude Restaurants, LLC (GFR) for the sum of \$1,000,000 in an asset purchase agreement. Matt Sheridan and John Cameron, each the President of his respective company, are in preliminary negotiations to form NewCo, which would result in an Operating



Agreement. NewCo will operate Gastro Grant and explore franchise opportunities in Georgia and surrounding states. Matt and John have decided that it would make sense to draft an LOI as an initial matter to get the ball rolling and set out some of the deal points that are most important to the two parties regarding the creation of NewCo and the sale of assets of GG IFC. Matt and Mason have come to you for representation during these negotiations and for assistance in drafting the LOI.

There are a number of important concerns that the Sheridans/IFC would like for you to address in the negotiations for the LOI:

1. The Sheridan brothers have a long history of working well together and thus far have never had an Operating Agreement for one of their ventures. In order to move forward with this deal with GFR, however, they will need to come to some understanding regarding expectations of management and control in NewCo. Also, Matt is reluctant to let a restaurant associated with his brand be completely out of his control, which is why he will agree to let GFR have a controlling interest in NewCo to operate GG, but will not sell the gastro pub outright to GFR. Ideally Matt and Mason would keep \_\_\_\_ control of NewCo with IFC. They could be willing to reduce IFC's interest to \_\_\_\_, but they would not consider it worth their while to have anything less.
  - a. Please note that for whatever percentage IFC negotiates in NewCo, the voting percentage will be exercised collectively by IFC and not split between Matt and Mason. For example, if IFC obtains a 30% interest in NewCo, all 30% will be voted collectively by IFC rather than give Matt a 15% individual vote and Mason a 15% individual vote. How Matt and Mason handle these internal IFC issues, while relevant, is beyond the scope of this assignment.
2. The Sheridans understand that John and the GFR team will need time to perform due diligence. Matt and Mason,

however, will be out of the country for [timeline omitted]. They leave on [ ], so Matt would like for final agreements<sup>107</sup> to be signed by [ ] at the very latest, though he would prefer to build in a bit more leeway in case any issues crop up closer to the closing date. The key for him is making sure the deal is finished before he leaves.

3. Matt knows that GFR will likely be trying to get bank financing for this transaction. However, Matt is very opposed to conditioning this deal on GFR's ability to get financing. Even with economic improvements, Matt is not even sure that GFR will be able to get bank financing. If Matt were to agree to any sort of condition regarding financing, it would only be if he could get something in return—Matt has asked you for some creative solutions here that might provide him at least some small bit of protection in the event that (a) he gives GFR the closing condition, (b) GFR does not get the financing, and (c) GFR then refuses to close the deal. The two of you have preliminarily discussed options such as break-up fees, earnest money and other incentives for GFR to close. (See research file).
4. The manager of GG is Kim Kehoe. Kim and Matt have been friends since childhood and Kim has managed the restaurant for the past 5 years. Matt wants to make sure the LOI specifies that Kim will be retained by NewCo as the manager of the operation after closing (once IFC loses control). Preferably, he would like GFR/NewCo to agree to [terms of change control employment agreement]. This agreement could be negotiated and executed simultaneously with the negotiation and execution of the Definitive Agreements contemplated in the LOI. Matt hasn't made any promises to Kim regarding these terms, however, so is fairly flexible in terms of what he will agree

---

107. The agreements that would be signed at Closing would be the Operating Agreement for NewCo, the Asset Purchase Agreement between NewCo & IFC, as well as any other agreements contemplated by the parties such as employment contracts, noncompetes, etc.

to if there are certain concessions that need to be made. Kim is talented and will land on her feet whatever happens, especially since Matt can perhaps offer her a position in one of his other restaurants. NOTE: Kim, if anything, would be the operating manager of GG the restaurant, not the statutory “manager” of NewCo LLC if it is manager-managed. The issue of management structure and control of NewCo is an issue to be negotiated by the parties.

5. Matt and Mason obviously plan to continue their other restaurant endeavors and perhaps to open new restaurants in the future (maybe even the near future). Matt and Mason want to make sure there is nothing in the LOI or the final operating agreement of NewCo that would impede their ability to open a new restaurant in the future, even a restaurant in Grant Park.
6. The parties have tentatively decided that the transfer of GG IFC assets, inventory, trademarks, etc. in GG gastro pub is worth \$1,000,000; thus, NewCo will need initial financing of \$1,000,000. Matt would like GFR to pay whatever their buy in is to NewCo (their ownership percentage of \$1M) up front—though he is willing to negotiate on this point if it would increase the beneficial terms he is able to get on other issues. Note: Financing is not an issue for IFC because they are selling the assets of GG IFC (an IFC subsidiary) to NewCo and will receive cash from GFR on their percentage of the \$1M purchase price which can be used to fund IFC’s contribution to NewCo.
7. Matt and Mason recognize that GFR will need access to GG IFC books and records, employees, customer information, contracts, etc. to perform due diligence. However, Matt and Mason do not want GFR’s representatives to have unfettered access to these individuals and documents. Matt and Mason would like themselves and Kim to serve as the gatekeepers for the due diligence process, such that any GFR representatives must go through them to speak to any individuals

affiliated with IFC/GG and to retrieve any documents requested. If GFR's representatives need physical access to the restaurant, it will have to be during times deemed appropriate by Matt, Mason, and Kim. Finally, Matt and Mason want GFR to agree that none of the representatives who come to perform due diligence wear any clothing indicating their affiliation with GFR—Matt and Mason are going to tell employees that the due diligence team is a team of accountants performing an audit on the restaurant. They do not want the employees or patrons to catch wind of the possible transaction until it is more of a sure thing.

8. Matt and Mason understand that the LOI will be largely a non-binding document. However, they think it is important to include a binding one-way confidentiality provision that will be binding on GFR and its representatives. John and the GFR team will be learning a lot of information about GG IFC that Matt and Mason do not want them to be able to use this information to their benefit if the deal falls through. Also, Matt would like the confidentiality provision to specify that GFR and its representatives will not be able to talk to anyone about the fact that the parties are in these negotiations in the first place. He is concerned that if his patrons hear some grumblings about the deal before it's a "sure thing," it might negatively affect the other IFC enterprises.
9. In their preliminary negotiations, John indicated to Matt that he might want to lock him and Mason in to some period of exclusivity, in which they would not be able to entertain other offers regarding GG IFC. Matt is willing to agree to a limited period of exclusivity, but they will only agree to not solicit other bidders during that period. He does not want to agree that he will not entertain other unsolicited offers. Matt may be more open to negotiating these issues if GFR will agree to an earnest money deposit up front, especially if that money is subject to a reverse break-up fee (i.e., released to IFC if the deal doesn't close because of GFR backing out, not obtaining financing, or

any other defined reason). Your initial research<sup>108</sup> suggests that exclusivity periods and any closing conditions/fees will want to be binding.

**Confidential Instructions to Counsel for Gud Fude Restaurants LLC—Client A**

NOTE: During negotiations you may reveal some of this information to your opposing counsel; however, you are not allowed to show opposing counsel these Confidential Instructions.

John Cameron, President of Gud Fude Restaurants, LLC (GFR) has retained you to represent it in negotiations with Intown Foodies Collective, LLC (IFC) to form a new LLC (NewCo) between the two companies. IFC, represented by its President Matt Sheridan, is the sole member of Gastro Grant IFC LLC (GG IFC), which operates Gastro Grant (GG), a gastro pub located in Grant Park. John and Matt need to negotiate an Operating Agreement for NewCo, which will operate and potentially franchise Gastro Grant in Georgia and the Southeast.

John and Matt have been in preliminary negotiations and have decided that they want to draft an LOI as an initial matter to get the ball rolling and set out some deal points. So far the parties have agreed upon a preliminary purchase price of GG IFC's assets from IFC of \$1,000,000. John has come to you for assistance in drafting the LOI and helping him/GFR think through the issues of forming NewCo with IFC and the upcoming sale.

There are a number of important concerns that GFR would like for you to address in the negotiations:

1. John/GFR want a controlling interest in NewCo. They would prefer to do an outright purchase of GG IFC from IFC, but Matt is unwilling to get entirely out of the restaurant all together. John would prefer for GFR to be a

---

108. As a basic rule of thumb, your research suggests that provisions you want to remain in effect regardless of whether the final agreements (operating agreement and asset purchase agreement) go through should be BINDING. This means that confidentially conditions on negotiations, closing conditions and other terms, like exclusivity, that govern the negotiation process may want to be binding. (See research file).

\_\_\_ owner and just let IFC have namesake power only. John will take \_\_\_ for GFR, but will not be happy with a deal that results in GFR having less than \_\_\_ of NewCo.

2. The parties have tentatively decided that the transfer of GG IFC assets, inventory, trademarks, etc. in GG is worth \$1,000,000. Therefore, GFR and IFC will have to collectively invest \$1M in NewCo; the individual obligation will depend upon the ownership percentage. For example, if GFR negotiates for a 75% control of NewCo, then GFR will contribute \$750,000 and IFC will contribute \$250,000.
3. John would like to make sure that Kim Kehoe, the manager of GG, will stay on with the restaurant post-closing as an employee. John is willing to negotiate a [terms of a change control employment contract]. Ideally, the contract between Kim and NewCo would be negotiated and executed simultaneously with the asset purchase agreement and any other ancillary agreements. GFR does not want NewCo to sign a contract with her committing NewCo to more than one year in case all of the parties involved just don't get along well with each other. NOTE: Kim, if anything, would be the operating manager of restaurant operations at GG, not necessarily the statutory "manager" of NewCo LLC if it is a manager-managed LLC. The issue of management structure and control of NewCo is an issue to be negotiated by the parties.
4. GFR wants to make sure that Matt/IFC doesn't go out and open up a new gastro pub near Grant Park after the closing of the asset purchase agreement and the formation of NewCo.
5. John would like the LOI to contemplate that he and GFR's lawyers, accountants, and other representatives have unfettered access to GG IFC's books, records, employees, etc. for purposes of performing due diligence for the asset purchase agreement after the signing of the LOI. John understands that Matt may have concerns about GFR representatives showing up at odd hours and talking to

people without notice, so John is perfectly willing to be reasonable about how and when individuals are contacted and documents are reviewed, but John does not want to have to jump through a bunch of hoops every time he or one of GFR's lawyers needs something.

6. GFR would like to lock IFC into a period of exclusivity during which it cannot go out and solicit other offers to partner with GG IFC. Ideally, this period would extend [desired timeline], but John understands that this position might be too rigid—at least one month though is critically important so they can conduct due diligence. John is also concerned about unsolicited offers. As such, John/GFR would also like to get an agreement from IFC that it will not respond to unsolicited offers during the exclusivity period. If John is unsuccessful in getting IFC to agree to that, however, John would like your advice about whether there is anything else he might bargain for on behalf of GFR to give GFR some comfort that it isn't being used as a warm up offer (or interest stirring offer), after expending a lot of money on due diligence and legal fees, it ends up empty handed. He may be willing to negotiate further on these points if IFC is willing to contribute to an escrow or earnest money account, the funds of which would be available to GFR in the event that IFC backs of the deal to sell to a third party (break-up fee) or covers expenses incurred by GFR (i.e., due diligence costs). (See research file).
7. Along these lines, John would like to keep Matt and Mason (and Gastro Grant's employees) from discussing the possible sale and stirring up interest from other restaurant franchises in town. As such, John would like for HTRS to include a confidentiality provision in the LOI.<sup>109</sup>

---

109. As a basic rule of thumb, your research suggests that provisions you want to remain in effect regardless of whether the final agreements (operating agreement and asset purchase agreement) go through should be BINDING. This means that confidentially conditions on negotiations, closing conditions and other terms, like exclusivity, that govern the negotiation process may want to be

8. In terms of timing, the staffing at GFR's office is pretty lean, so GFR thinks the due diligence process may take a little time. Plus, GFR needs to obtain financing and wants to make sure that it is not obligated to close the transaction if it is unable to obtain financing. As such, John/GFR would be willing to commit to complete due diligence and sign the agreements<sup>110</sup> on or before [ ], so long as there could be a delayed closing of the asset purchase agreement & creation of NewCo to make sure GFR is able to obtain the necessary financing. John understands that GFR's bank will want to see signed final documents before issuing the financing, so this will hopefully kill two birds with one stone—appease Matt, who is anxious to have a signed contract, and appease GFR's bank. The bank has told John that it would probably take [timeline] after it receives the signed final agreements to get the financing issued, so GFR should be able to close by [timeline]. Once the final agreements are signed, the closing can take place later. However, John would like the LOI to make clear that if GFR cannot get financing lined up at any point, GFR does not have to close the deal. GFR is not interested in making the acquisition if it cannot get bank financing.
9. John understands the LOI's are typically non-binding, but wants to get as much of this deal locked down in concept as early as possible. He is nervous about spending all of this time agreeing in concept without making anything final. Whatever the final LOI looks like, he will expect you to walk through it with him and explain why certain provisions are made binding or not. Be prepared to answer your client. (See research file).

---

binding.

110. The agreements that would be signed at Closing would be the Operating Agreement for NewCo, the Asset Purchase Agreement between NewCo & IFC, as well as any other agreements contemplated by the parties such as employment contracts, noncompetes, etc.



*Appendix 2: Excerpt from Research File***Associate Research File****LETTERS OF INTENT**

A Letter of Intent is a document that outlines the preliminary material terms of a proposed transaction. The Letter of Intent serves as evidence of the intent of the parties to further negotiate the terms of a definitive agreement and consummate a proposed transaction on or before a specified date. A Letter of Intent is similar to a term sheet or a memorandum of understanding, and sometimes the terms are used interchangeably, but a Letter of Intent tends to be more detailed than a term sheet (which is typically a bullet-point list) and is used when the parties are closer to reaching an agreement.

Although a Letter of Intent is executed or acknowledged by each party, parties typically prefer that, with the exception of a few provisions, the Letter of Intent be non-binding. Provisions that the parties usually agree should be binding include: exclusivity, confidentiality, expenses, termination fees, and a covenant to negotiate in good faith. A well-drafted Letter of Intent clearly states which provisions are binding and also expressly states that the remainder of the document is non-binding. Otherwise, if the Letter of Intent is silent as to whether it is non-binding, it is generally presumed to be binding and enforceable. The U.S. Court of Appeals for the Second Circuit has stated that “the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event.”

The following is an example of language included in a Letter of Intent in which the parties expressly state their intent that the agreement be non-binding:

No binding agreement shall exist unless and until the Definitive Agreement has been executed and delivered by the Parties, and the execution of this non-binding Letter of Intent shall only evidence the current intention of the Parties to proceed with the negotiation and preparation of the Definitive Agreement.

**Characteristics of Letters of Intent**

While Letters of Intent may vary depending on the type of proposed transaction in connection with which they are being delivered, they typically have certain common elements, such as:

- ☐ A description of the proposed transaction and key terms;
- ☐ The transaction timeline;
- ☐ Any standstill and termination provisions;
- ☐ A description of the binding and non-binding obligations of the parties; and
- ☐ Other contractual rights of the parties.

**Description of Anticipated Transaction**

The Letter of Intent provides an outline of the transaction before drafting of the definitive agreement commences. It sets out the key deal points as well as many of the terms agreed upon by the parties. Preparing a Letter of Intent gives the parties an opportunity to negotiate many of the material deal terms in advance, which can expose potential deal breakers earlier in the negotiation process. A Letter of Intent also indicates when and how some key deal terms may be changed or amended by the parties, such as detailing what events would cause an adjustment to the purchase price or lending amounts. Letters of Intent also act to put third parties on notice that the parties are negotiating and demonstrate the commitment of the parties to negotiate in good faith towards the consummation of the transaction.

*Appendix 3: Excerpts from Annotated Form LOI***LETTER OF INTENT TO FORM AN LLC***[date]*To: *[Organizers/Future Members]*Re: Creation of *[Company]*

Based on the preliminary information reviewed to date, and subject to the conditions contained in this letter of intent ("LOI"), confirms the interest of \_\_\_\_\_ ("Parties"), to enter into an agreement to form \_\_\_\_\_ as a limited liability company ("LLC") where the Parties will become members of the LLC ("Members"). The proposed LLC would be formed based upon the following agreed upon basic principles contained in this LOI regarding structure, capitalization, and management of the LLC, which will be included in a Certificate of Organization and an Operating Agreement to be executed by the Parties (the "Formation Documents"). The Formation Documents and the contemplated asset purchase agreement (the "Purchase Agreement") to be completed between \_\_\_\_ *[selling entity]* and *[NewCo]* for the acquisition of the assets of *[entity]*, shall be the complete transactional documents contemplated by the Parties containing these and other terms to be negotiated by the Parties (collectively the "Definitive Agreements").

1. **STRUCTURE OF THE LLC:** The LLC will be a \_\_\_\_\_ *[state]* \_\_\_\_\_ *[member-managed or manager-managed NOTE: tie in with para. 6 below]* limited liability company consisting of *[list out members]*.
2. **BUSINESS OF LLC:** The LLC will engage in \_\_\_\_\_ *[define the scope of the business— what will it do now, in the future?]*
3. **GEOGRAPHICAL AREA:** The LLC will do business in \_\_\_\_\_ *[define scope]*.
4. **OWNERSHIP OF LLC:** The Company will be owned \_\_\_\_\_ *[describe ownership % & include the number of authorized units]*.
5. **CAPITAL INVESTMENT OF THE LLC:** The Parties agree to make an initial capital investment in NewCo collectively in the amount of \$1,000,000. The initial capital

investment represents the initial agreed purchase price for all assets, tangible and intangible, held by [entity]. Each Member's share of the initial capital investment will reflect its ownership interest in NewCo.

6. **MANAGEMENT**—*draft this section based upon whether MEMBER MANAGED or MANAGER-MANAGED as decided above. If Member managed, what are the voting percentages? Deadlock concerns? Is a board utilized? How are decisions made? If it is Manager-Managed, how is the manager selected? Is it the majority partner? What is the manager's authority? Is any power reserved for the members? NOTE: if not a 50/50 voting structure on any issue, but reflects ownership %, unless a decision requires unanimous consent or gives the minority member a veto vote, the minority member, in effect, has NO vote. To begin thinking about drafting this section, consider some options below:*
7. **FIDUCIARY DUTIES:** *[draft fiduciary duties of members/managers. Address competition concerns here]*
8. **FINANCIAL RIGHTS:** *[determine whether need to alter the default rules with regard to financial compensation, distributions, salaries, etc.]*

*Appendix 4: Issue Identification Grid*

	<b>Client's Ideal</b>	<b>Client's Min./Max.</b>	<b>Notes &amp; Arguments</b>	<b>Final Decision<sup>111</sup></b>
<b>Ownership Interest</b>				
<b>Employment Issues</b>				
<b>Management Member- or Manager- managed? How structured? Control? Deadlock?</b>				
<b>Fiduciary Duties Members? Managers? Competition?</b>				
<b>Financial Rights</b>				
<b>Exclusivity? Expenses? Incentives?</b>				
<b>Confidentiality</b>				
<b>Other issues?</b>				
<b>Closing dates, finances, conditions?</b>				

---

111. To be completed after negotiations in Class 10.

*Appendix 5: Question Sets*

**To prepare for negotiations in Classes 8–10, please come prepared to discuss:**

1. Who is your client?
    - a. Is it the organization or the president?
    - b. Are there any professional responsibility issues involved in representing companies in these types of transactions?
  2. Why are the parties negotiating a letter of intent?
    - a. What benefit is there to your client?
  3. What is the preferred ownership percentage for your client?
  4. How should you describe the business of NewCo—what would its scope be?
  5. Would a member-managed or a manager-managed LLC be better for your client?
  6. What is the difference between an **asset purchase agreement** like the one contemplated by the parties and just an outright sale of GG IFC (**unit purchase agreement**) to NewCo?
  7. What are the advantages/disadvantages of an exclusivity period?
  8. What incentives or disincentives can the parties build into the LOI to promote finalizing the asset purchase agreement and the creation of NewCo?
  9. What are the employment considerations in this deal?
  10. What fiduciary duty issues do the facts raise?
  11. What should be the scope of the operating agreement of NewCo?
  12. Aside from the asset purchase agreement and the operating agreement for NewCo, what ancillary agreements or specific provisions should be included in the final documents for this contemplated deal? (employment contracts, confidentiality, non-compete agreement, etc.)
  13. If an LOI is not traditionally binding what provisions should be made binding in this LOI? How are they made binding?
-

## Appendix 6: Grading Grid

LOI Agreement Grading Grid	
Points <u>    </u> out of 30	
GFR Counsel	IFC Counsel
<b>Information to be completed:</b>	
Basic Header	(1)
Parties in intro	(1)
State of formation	(1)
Member or Manager Managed?	(1)
Business of LLC	(1)
Geographical area of LLC	(1)
OWNERSHIP %	(1)
CAPITAL INVESTMENT	(1)
Para 6—MGMT	How structured. Control? Deadlock? (2)
Para 7—Fiduciary Duties	Competition addressed here (2)
Para. 8—Financial Rights	(1)
Para. 9—Exclusivity	(2) (2) financial incentives
Para 10—Closing Date Para 11—Costs	(3) total
Para 12—Confidentiality	(2) Binding? To whom applied? Duration? Scope?
Para 13—Negotiations & Binding	(2)
Para 14—Closing Conditions	(2)
<b>Additional Terms</b>	
<i>Consistent use of terms?</i> +2	
<b>Notes about agreement reached</b>	
<i>Demonstrated high level of thinking through issues? Practical?</i>	
<i>Consistent? Thorough?</i> + 2	
<b>Additional Comments</b>	

*Appendix 7: LOI Evaluation*

Name: \_\_\_\_\_

Name of Opposing Counsel: \_\_\_\_\_

1. Please state the percentage of overall work contributed by your **opposing counsel**. Provide a description of how the work was divided in your team.
  
2. Please provide comments evaluating the performance and professionalism of your **opposing counsel** (availability, prepared for negotiations, assistance in thinking through solutions, assistance in drafting final work product, etc.)
  
3. Please describe your performance and professionalism in this assignment. Additionally, please state what you believe was your strength on the team, and your weakness.
  
4. Based on the above, please assign your **opposing counsel** a grade for her/his role and participation in the assignment, using a letter grade scale.
  
5. On a scale of 1–5 (1 being the lowest and 5 being the highest) please rank the value you received from time to meet with **co-counsel** before opposing counsel negotiations. Please explain.

Initial Co-Counsel Meeting to identify client buyer/seller position  
Class 9



Co-counsel meeting before initial drafting exercise October 27

Co-counsel meeting before final negotiation Class 10

6. On a scale of 1–5 (1 being the lowest and 5 being the highest) please rank the value you received from the mid-point assignments. Please Explain.

Initial Team Draft due on October 27 with feedback

Completing the Issue Grid for negotiations (no feedback)

7. Please identify the part of the assignment that you
  - a. felt the most comfortable tackling
  - b. felt the least comfortable tackling.
8. Please provide comments regarding what would have helped better prepare you for this assignment and/or suggest changes for future negotiation/drafting assignments.
9. Please provide any additional comments regarding this assignment:

---

---

**THE WASHINGTON AND LEE  
LAW ALUMNI ASSOCIATION  
STUDENT NOTES  
COLLOQUIUM**

---

---

